ONTARIO ATTORNEY GENERAL LAW LIBRARY
KF 8719 O684 1986 STK
Brief to the Inquiry Into the Organizati
00001387

BRIEF TO THE INQUIRY INTO THE ORGANIZATION, JURISDICTION AND STRUCTURE OF THE COURTS OF ONTARIO

(ZUBER COMMISSION)

KF
8719
O684
1986
c.1

KF 8719 O684 1986 c.1

Advocates' Society.
Brief to the Inquiry into
the Organization ...

00001387

KF 8719 O684 1986 c.1

Advocates' Society.
Brief to the Inquiry into
the Organization ...

MINISTRY OF THE
ATTORNEY GENERAL
LAW LIBRARY

ATTORNEY GENERAL
LIBRARY

COMMITTEE

W. S. Wigle, Q.C. - Chairman
Rodica David, Q.C.
G. Dennis Lane, Q.C.
L. H. Mandel, Q.C.
Rino A. Stradiotto, Q.C.

SUB-COMMITTEES

JURISDICTION AND STRUCTURE OF COURTS

Rino A. Stradiotto, Q.C.

FAMILY LAW

Rodica David, Q.C. - Chairperson
Moishe Reiter, Q.C.
John R. R. Jennings, Q.C.
Susan E. Lang (Secretary)
Lawrence R. Morin, Q.C.
Edward W. Graves, Q.C.
Alan P. Ingram
Gregory W. Cooper
Rebecca Regenstreif
Clifford S. Nelson
Philip M. Epstein, Q.C.
Bernd E. Zabel

TRIAL MECHANICS
SPECIALIZATION OF JUDGES
COMPUTERIZATION

Dennis Lane, Q.C.
Thomas Dunne, Q.C.

FEE SYSTEMS, PARALEGALS, ETC.

Lawrence Mandel, Q.C. - Chairman
W. T. McGrenere, Q.C.
Richard Rose, Q.C.

CRIMINAL LAW

John M. Rosen - Chairman
Martin Kerbel, Q.C.

7231692b

SUMMARY OF RECOMMENDATIONS

1. Controlling consideration is the interest of the litigants.

2. Action to be tried by fixed trial dates.

3. The Province to be divided into judicial sectors following caseload and demographic studies. (For the purpose of this report the sectors to be called "Circuits").

4. The Court of Appeal to consist of nine (9) judges, centred in Toronto, to sit, in panels, of at least five (5) judges.

5. Creation of an intermediate Court of Appeal, centered in Toronto, which would sit in Circuit Centres, as may be required for the expeditious hearing of appeals. This court will usually sit in three judge bancs. Appeals presently entertained by the Divisional Court will be heard except for interlocutory appeals.

6. Formalized pre-appeal hearing mechanisims to promote resolution of appeals or narrowing of issues to be argued.

7. Maintain a superior trial court centred in Toronto, which will travel to Circuit Centres (or other court facilities) as required. Jurisdiction will be as of right where the amount involved exceeds an appropriate monetary value, certain family law matters, other complex civil matters by leave; or, criminal matters with leave. Objective criteria will be set for granting leave, and will include cases where the principle of law involved may significantly affect other cases. This court will entertain originating applications now dealt with by the Divisional Court, as well as the interlocutory appeal functions of the Divisional Court.

8. Establish a centralized court data network and administration system for all courts, utilizing state of the art technology and business management methods to facilitate fixing trial dates, and the optimal use of all court facilities and judicial manpower available in the Province. In addition, the District Court, in each Circuit, will be organized under a Chief Judge, with an administrator, to utilize all the court facilities and judicial manpower within the Circuit.

9. District Court to have jurisdiction over all originating matters.

Digitized by the Internet Archive
in 2018 with funding from
Ontario Council of University Libraries

https://archive.org/details/mag_00001387

10. Provincial Court, Civil and Criminal Division, to be merged over time into a unified court with judges rotating between civil and criminal matters assigned by the Chief Judge.

11. Increase the jurisdiction of the Civil Division of the Provincial Court, throughout Ontario, to $5,000.00, or any amount on consent.

12. The Family Law matters to be removed from the Provincial Court to the expanded District Court.

13. Simplified procedures to reduce cost to litigants.

14. Oppose formalized specialization of judges.

15. Retention of civil juries.

16. Expansion of the role of the pre-trial judge.

17. Arbitration and mediation procedures to be made available but not compulsory.

TABLE OF CONTENTS

Page

PART 1

INTRODUCTION 8

PART II

ADJUDICATION OF DISPUTES 9

A. PRESENT SYSTEM OF THE ADJUDICATION OF LAW DISPUTES

1. ALTERNATE DISPUTE RESOLUTION 9

(1) Pre-Trial Hearings 9
(2) Offers to Settle 12
(3) Request to Admit 12
(4) Arbitration 13
(5) Mediation 15

2. COST FACTOR TO LITIGANTS 17

(1) Rules of Civil Procedure 18
(2) The Litigation-Minded Client 19
(3) The Litigation-Minded Lawyer 19

3. COURT STRUCTURE 20

(1) Supreme Court of Ontario 20
(2) District Court 21
(3) Provincial Court 22

B. RECOMMENDATIONS

1. GENERAL 23

2. COURT STRUCTURE 24

(a) Geographic Organization 25
(b) Merger of Supreme and District Courts 25
(c) The Circuit System 28
(d) Summary Chart 30

3. COURT OF APPEAL 31

4. Intermediate Court of Appeal 32
5. Superior Court 32
6. District Court 33
7. Provincial Court 33

8. CASE MANAGEMENT 34

9. JUDGES 36

10. JURIES 38

11. ARBITRATION AND MEDIATION 38

Page

PART III

FAMILY LAW DISPUTES 39

A. PRESENT SYSTEM OF THE ADJUDICATION OF FAMILY LAW DISPUTES

1. NATURE OF FAMILY LAW DISPUTES 39

2. ALTERNATE DISPUTE RESOLUTION 40

(1) Assessments in Custody Disputes 40
(2) Legislative Removal of Conduct as Significant Element in Family Disputes 41 41

3. COST FACTOR TO FAMILY LAW LITIGANTS 42

(1) The Family Law Act, 1986 42
(2) Interim Relief 45
(3) Fragmented Jurisdiction 46

4. COURT STRUCTURE 47

(1) Supreme Court of Ontario 47
(a) Family Law Division (Toronto) 47
(b) Outside Toronto 50
(2) District Court 50
(a) Judicial District of York 50
(b) Outside the Judicial District of York 51
(3) Provincial Court (Family Division) 51
(4) Unified Family Court 52

B. RECOMMENDATIONS 54

1. GENERAL 54

2. PARALLEL COURT STRUCTURE 54

(1) Jurisdiction 54
(2) Procedure 57

3. SPECIALIZATION OF JUDGES 62

4. CASE MANAGEMENT 65

Page

PART IV

CRIMINAL LAW

A.	INTRODUCTION	67
B.	COURT STRUCTURE:	67
	(1) Court of Appeal	67
	(2) Intermediate Court of Appeal	68
	(3) Superior Court	68
	(4) District Court	69
C.	JURIES	70
D.	CASE MANAGEMENT	70
E.	PROVINCIAL COURT:	70
	(1) Structure	70
	(2) Provincial Court Judges	73
	(3) Recommendations	74
F.	JUSTICES OF THE PEACE	76
	(i) The issuing of search warrants	76
	(ii) Bail hearings	78
	(iii) Case Management System	78

PART V

APPENDIX

1.	ACTIVITY SUMMARY OF VARIOUS COURTS (1983 - 1986)*	79
	(i) Supreme Court	79a
	(ii) District Court	86
	(iii) Provincial Court	91

* Ministry of the Attorney General, Court Statistics Annual Report, **Fiscal Year 1985/86.**

PART 1

INTRODUCTION

ONTARIO SOCIETY IS CHANGING RAPIDLY. NOT ONLY HAS OUR POPULATION INCREASED, BUT IT HAS CHANGED IN ITS CULTURAL, ETHNIC, RELIGIOUS, EDUCATIONAL AND ECONOMIC MAKEUP. RELATIONSHIPS BETWEEN INDIVIDUALS HAVE CHANGED: BETWEEN AN EMPLOYER AND EMPLOYEE: HUSBAND AND WIFE: PARENT AND CHILD: YOUNG AND OLD: RELIGIOUS GROUPS AND THEIR FOLLOWERS. GOVERNMENT AND PRIVATE BUREAUCRACIES HAVE MUSHROOMED. LEGISLATION HAS BEEN ENACTED TO DEFINE AND PROTECT THE RIGHTS OF ALL CITIZENS. CITIZENS, MORE THAN EVER, LOOK TO THE COURTS FOR PROTECTION OF THEIR RIGHTS. THE VOLUME AND COMPLEXITY OF ISSUES BEFORE THE COURTS HAVE INCREASED DRAMATICALLY.

IT WOULD, AT FIRST BLUSH, APPEAR THAT THE APPOINTMENT OF MORE JUDGES AND INCREASING THE AVAILABLE COURT SPACE WOULD PRESENT AN APPROPRIATE SOLUTION TO THE PROBLEM. WE MUST DISAGREE. IN SPITE OF THE BEST EFFORTS OF INDUSTRIOUS AND DEDICATED JUDGES, LAWYERS AND ADMINISTRATORS, SOME OF THE COURTS HAVE EXPERIENCED CHRONIC PROBLEMS IN TRIAL SCHEDULING FOR MANY YEARS. WE SUBMIT THAT THE SOLUTION LIES IN A FUNDAMENTAL RE-ORGANIZATION OF OUR SYSTEM.

PART II

ADJUDICATION OF DISPUTES

A. PRESENT SYSTEM OF ADJUDICATION OF DISPUTES

1. ALTERNATE DISPUTE RESOLUTION

Over the course of the last several years, the administration of justice has evolved to recognise on the one hand the desirability of promoting settlement of issues, and on the other hand the essential right of every person to have his or her dispute adjudicated by an impartial judge where settlement is impossible. The following are specific examples of methods devised by the Bar, the Judiciary and the Legislatures to promote settlement:

(1) Pre-Trial Hearings:

In family law matters pre-trials have been held in family disputes since the mid 1970's. The parties attend with their lawyers. The forcefulness of some of the pre-trial judicial officers are such that many cases are settled at the pre-trial stage. Pre-trials are available not only once the case has been set down for trial, but virtually at any stage of a family law dispute where requested by counsel.

In civil litigation matters pre-trials have been held for several years and were formally established by Practice Direction in

the early 1980's. The procedure for pre-trials was entrenched in our Rules of Civil Procedure as of January 1st, 1985. Although the parties generally do not attend civil pre-trials, a forceful pre-trial judicial officer can be instrumental in promoting settlement of cases or at least narrowing issues.

The conduct of pre-trials could be improved in numerous ways, examples of which are as follows:

(a) Although at present Rule 50.02 provides that a judge may make whatever order he or she considers necessary or advisable in respect of the conduct of the proceeding, orders of this nature are very rarely made since many pre-trials take place before commissioners and not judges. Pre-trials should in every instance be held before a judge who has experience in conducting trials, and whose authority would likely carry more weight with the parties. Pre-trial judges should be encouraged to make orders concerning such matters as joint

document briefs for the trial judge, the narrowing of issues to be tried, the witnesses to be called in proof of various facts, the admission of facts particularly of a non-controversial nature, and the simplification of proof of various facts where this appears appropriate.

(b) Subject to the discretion of the pre-trial judge, the parties should be permitted to attend at a pre-trial. Where issues are narrowed or the case is settled, the parties would then be in a position to sign minutes of settlement or agreed statement of facts or agreed statement of issues to be tried at the time of the pre-trial. Experience has proved that if these matters are not dealt with at the pre-trial stage, they may be forgotten and the trial is thereby lengthened.

(2) Offers to Settle

Offers to settle have been entrenched in the Rules of Procedure at all levels of Court in family law matters since approximately 1977. The significance of delivering reasonable offers to settle became patently clear to family law litigants since the eloquent decision of Mr. Justice Galligan in Dziedzic vs Dziedzic (1978) 6 RFL (2d) 332. In virtually every family law case, the parties therefore exchange offers to settle.

In civil matters payments into court were made but formal offers to settle were unknown until the coming into force of the Rules of Civil Procedure in January of 1985. With the coming into force of Rule 49, offers to settle are generally exchanged in civil matters and carry with them stringent cost consequences.

(3) Requests to Admit

Rule 51 of the Rules of Civil Procedure provides for parties to deliver requests to admit where appropriate. The increasing use of this procedure has had the effect of substantially shortening trials. Hopefully this procedure will be used with increasing frequency.

(4) Arbitration

Arbitration in family law matters can be utilized to adjudicate a dispute between spouses in two types of situations:

a) where the parties have executed a separation agreement which provides for arbitration or;

b) where the parties wish their matters to be adjudicated by the arbitration process as opposed to the judicial process.

Although many separation agreements provide for arbitration as a method of adjudicating disputes, this method of procedure is rarely used. It is virtually never used where there is no agreement that provides for it.

In civil matters apart from labour disputes, arbitration is rarely used. Arbitration is a cumbersome and undesirable method of procedure by reason of the following:

i) The procedure before the arbitrator is one that is rarely clearly defined;

ii) The arbitrators must be paid for their services, usually by the parties;

iii) The arbitration process is still subject to either judicial review or appeal. The saving of costs to the litigants is therefore minimized and sometimes the process is more expensive than court proceedings.

iv) in an arbitration procedure, an arbitrator or arbitrators perform the adjudication function as opposed to a judge. There is still an adjudicator. Arbitrators are appointed on an ad hoc basis and do not have the experience of judges. Moreover our judiciary tends to command more respect in our society than do arbitrators. The litigant that is dissatisfied with an arbitrator's award may be less likely to comply with it than if he or she were faced with a judgment of a court.

(5) Mediation

More than ten years ago active practising members of the family law bar began to co-ordinate their efforts towards settlement of family law disputes with behavioural scientists such as psychiatrists, psychologists, and social workers. Behavioural scientists have taken a more active interest in promoting settlement of family law matters. Prior to the Children's Law Reform Act which was passed in 1982, a number of experienced family law practitioners were utilising the services of behavioural scientists to mediate custody disputes between their respective clients. If the parties reached a resolution then the lawyers drafted the formal documents in order to ensure that any written agreement was capable of enforcement in a court where necessary. With the coming into force of the Children's Law Reform Act, mediation on consent was provided for in the legislation itself. The Family Law Act, 1986 provides for mediation of financial matters on consent. Mediation facilities were made available through the Provincial Court, (Family Division) and later in the Family Law Division of the Supreme Court of Ontario in Toronto through the mediation service.

Although some continuing education programmes both through the Law Society and the Canadian Bar Association attempted to educate the practising bar on mediation facilities, the need for continuing education on the availability and desirability of mediation is one that should be addressed on a continuing basis.

Mediation can proceed on either a closed or open basis. In closed mediation the mediatior cannot be called upon as a witness and any communications made by the parties during the course of mediation cannot be referred to in court proceedings. The parties are free to express their views. If an agreement is reached between the parties, the mediator will present a report to each party. If no agreement is reached, the parties can still agree to have a report presented although this can be used for settlement purposes only and not for court proceedings. In open mediation, the mediator may be called as a witness and communications made within the mediation process are with prejudice. The mediator's report may be used in court proceedings.

In family law disputes concerning financial matters, mediation is a relatively new phenomenon. In very recent years a number of lawyers, some of whom have a social work background, have undertaken the task of mediating financial issues. Such a mediator must have a command of the legal principles involved, an understanding of the complexity of financial issues and an ability to view a case in an objective fashion. The use of mediators in financial matters will probably increase as more qualified people are available to mediate. Particularly in matters that involve relatively simple financial issues, there will no doubt be a trend to the increasing use of mediators.

In civil matters outside of labour disputes, mediation is relatively unknown. It is recommended that a procedure for mediation of all types of disputes be established and mediators be trained for use in all types of disputes.

2. COST FACTOR TO LITIGANTS

There is no question that the cost of litigation is extremely high to the litigants. The single advantage to the increasing cost of litigation is that it deters litigation and encourages settlement.

The cost of litigation can be traced to the following sources:

(1) Rules of Civil Procedure

In the Supreme Court of Ontario and the District Court of Ontario there are no streamlined procedures available for simple cases. Affidavits, cross-examinations on affidavits, motions for undertakings, production of a proliferation of documents (particularly in family matters where virtually all documents of any financial description throughout the course of an entire marriage have now been made relevant by The Family Law Act), lengthy examinations for discovery, case conferences, pre-trials, status hearings, issues hearings, and numerous other steps are equally applicable to the simple and the complex case.

Cases require virtually pounds if not tons of paper. Motion Records are required regardless of whether the matter is simple or complex. Each motion requires a separate Motion Record. Originating documents are so carefully and meticulously scrutinised by the court offices that the least little deficiency results in rejection. There is no end to the conceivable relevant productions that each party must make available to the opposing party.

Our judiciary has been reluctant to impose cost penalties for unnecessary procedures such as Motions without merit, oppressive cross-examinations and examinations for discovery, insistence on production of numerous documents most of which have relatively little relevance.

(2) The Litigation-Minded Client

Although the facilities for Alternate Dispute Resolution tend to promote ultimate settlement between litigating parties in most cases, there are still some clients that insist on having the matter litigated to the ultimate degree. Their motivations may be vengeance, anger, or simply a desire to wear down the opposing party. Sometimes lawyers are incapable of dissuading their clients from this course of action.

(3) The Litigation-Minded Lawyer

The practising bar in large measure recognizes the numerous advantages to clients of reaching an early and final settlement of the issues in dispute. The advantage of settlement are manifold and include the following:

a) minimal cost to the clients

b) minimal emotional trauma to the litigants

c) speed of resolution

d) increasing likelihood of compliance with an agreement as opposed to a court-imposed award.

Unfortunately, there are still a few, very few, lawyers who have not been educated to the advantages of the settlement processes in all matters and particularly in family law disputes. A programme of education is required for litigation counsel to familiarize them with methods available to promote settlement and the desirability thereof.

3. COURT STRUCTURE

(1) Supreme Court of Ontario

In Toronto, sittings consist of jury and non-jury sittings. Both trial lists operate in a manner which has involved considerable cost and inconvenience to lawyers, litigants and witnesses. Although various methods have been tested including assignment courts, control lists, etc., these have generally failed to alleviate the problem that it is impossible to predict when a case will be reached for trial.

Often a case is called for trial on very short notice and generally results in counsel being forced to request an adjournment because clients or witnesses are unavailable.

Outside Toronto although Supreme Court sittings are at fixed times, it is virtually impossible to predict whether any particular case will be reached at a particular sitting. In assizes sittings, it is rare that a civil matter will be reached for trial since the criminal matters take precedence.

It is not uncommon for counsel to be called for trial at two different Supreme Court sittings at the same time. Since counsel cannot proceed on both cases simultaneously, adjournments are usually requested.

The Society therefore recommends a system of fixed trial dates perhaps to be scheduled at the time that a matter is commenced.

(2) <u>District Court</u>

In District Court matters both within Toronto and outside of Toronto, the trial lists are more closely controlled and there is more predictability as to when a matter will be reached for trial.

(3) Provincial Court

There are presently three divisions of the Provincial Court namely Civil Division, Criminal Division and Family Division. A large portion of litigation is adjudicated in these Courts. The simplified procedure makes it possible for litigants to represent themselves without the assistance of counsel in appropriate cases. The administrative personnel will assist litigants in the completion of the necessary forms and procedures in order that the matter may proceed to a hearing. In the Provincial Court (Family Division) adjunct services are available to assist in the resolution of matters.

B.

RECOMMENDATIONS

1. GENERAL

The Society has taken as its objective, in considering a re-organized court structure, the establishment of a system that will provide for the orderly disposition of disputes as quickly as possible, at a much reduced cost to the litigant.

In any system there must be an overall philosophy. Although one takes as the ideal that all cases will be tried quickly and in an orderly way, all judges and all courtrooms will be occupied every reasonable minute of each day, this ideal is unlikely to be reached. The conflict then arises as to whether litigants, their witnesses and lawyers, should be stacked up, waiting for the settlement or completion of a trial on the list ahead of them, and be ready to go forward on a few hours notice (rather than let a courtroom or a judge appear to be without engagement) or whether fixed trial dates be given at the risk of a courtroom being unoccupied and a judge be without a trial to hear. Under systems which do not provide for advance trial dates, the cost of a judge's time and the courtroom space is balanced against the costs and inconvenience to many litigants, their

counsel and their witnesses in the unpredictable expectation that they may be called for trial the next day or three weeks from that day. The costs to the litigants, in this latter situation, far outweighs the cost of having a judge without a case to try. There is a more important consideration than cost, and that is the litigants' perception of justice when they view the way in which some of the court calendars are run. This is not to be critical of the court administrators - it is the inherent nature of the system. The Society opts for running the risk of having a judge without a trial, rather than having scores of litigants, witnesses, and their representatives, incur waiting costs which at times approach or exceed the amount involved in the litigation.

2. COURT STRUCTURE

(a) Geographic Organization:

The Province should be divided into geographic regions (for the purpose of this paper and to avoid confusion with existing regions, counties and districts, we will refer to the geographic regions as "Circuits").

Each Circuit would have a Circuit Centre which would be the

control centre for the courts administration of all County, District and Regional seats within the Circuit. The number of Circuits, location of Circuit Centres, the County and District seats within each Circuit, would be determined after a statistical study of the relative populations to be served, the distances separating the County seats from the Circuit Centre and the collective case load involved. For example, Toronto would be a Circuit Centre with perhaps Brampton and Whitby within its Circuit; while London might be a Circuit Centre for Windsor, Woodstock, Simcoe, Chatham, Sarnia, Goderich, Walkerton and Owen Sound. Other centres might include Hamilton and Ottawa, as well as a northern centre.

(b) Merger of Supreme and District Courts:

The Society opposes the concept of merger of the Supreme and District Courts.

The Society supports two courts, apart from the Provincial Court, one court to consist of a relatively small number of judges that would try complex and difficult cases involving significant and substantial issues. The other court would consist of a much larger number of judges to try all of the cases not coming within the jurisdiction of the Provincial

Court.

The two courts are required to meet the needs that a judicial system must meet. In a system that is designed to function on the basis of stare decisis, there is a need for a court that will frequently deliver considered decisions in writing that will serve as guides or landmarks. The importance of a consistent body of law that serves as a guideline in reducing the costs of litigation and the number of cases that will actually be tried cannot be overstated. There is a need for a court that is experienced in determining complex and difficult cases involving significant and substantial issues. It is our Society's view that these needs can only be met by a small Superior Court focused on meeting these needs. On the other hand, there is a need for a court to dispose of the ever-increasing number of equally important matters covering a wide variety of issues but that do not, in most instances, require that a written precedent setting decision be rendered. Prospective judicial candidates will be attracted to one or other of the courts having regard to what will be expected of them.

The advantages of a separate, smaller court to deal with complex and difficult cases involving significant and substantial issues are as follows:

1. The judges who will focus in trying these types of cases will quickly, by experience, increase their ability to try such cases and render precedent type decisions that will serve as guides to other judges. Judicial candidates will be attracted to this court who, by experience, temperament and ability, are inclined to deal with complex and difficult cases involving significant and substantial issues that will frequently require carefully reasoned and written decisions to serve as guides or precedents.

2. Judgments of a Superior Court give guidance to other judges, which guidance would likely be lost in a merged court of 200 or more judges. The reputation of the judge delivering a reported decision has great bearing on the weight given to the decision by other judges and counsel. It is important to have an identifiable group of judges whose judgments will be reported and serve as a guide for other judges and counsel.

3. Collegiality is essential to the evolution of a consistent body of law and collegiality is not attainable unless the numbers are small.

4. The Superior Court which moves from area to area to try the complex and more difficult cases involving substantial issues, avoids the perception or concern about regional differences and application of the law. Local residents may perceive that a judge who is not involved in the local community will consider certain cases more objectively and more consistently with a uniform attitude throughout the Province.

(c) The Circuit System:

The High Court has historically travelled to the County and District Centres throughout the Province. The advantages of the Circuit system are many and are, in part, discussed under the heading of "Merger". The Circuit system avoids the risk of the creation of local idiosyncrasies in County and District centres. It helps to maintain a uniform practice of law and the application of the law throughout the Province. The Society supports Circuit system within the Circuits proposed. Movement of Judges within the Circuit would maximize the use of all court facilities and help maintain an homogeneous standard in both the practice and application of the law.

The problems created by the present Supreme Court circuit system relate to trial scheduling. Some sittings are not long enough, others do not have enough cases to occupy the sittings. The unpredictability of the Judges being available in Toronto causes havoc at the Toronto sittings and in sittings in many of the other major centres. It is the Society's view that with appropriate technology, scheduling trials and Judges throughout the Province can be effectively allocated, as well as providing a constant presence of superior court Judges in Circuit centres.

(d) Summary Chart:

COURT OF APPEAL

(Sits in Toronto - 9 Judges)

INTERMEDIATE COURT OF APPEAL

(Centred in Toronto but
Sits in Toronto and Circuit Centres as required)

Hears appeals formerly heard in Divisional Court other than Interlocutory Appeals.

SUPERIOR COURT

Superior Court Judges trying actions in Toronto, Circuit Centres and other court facilities as required and as scheduled by central court administration facility. Includes jurisdiction of former Divisional Court with respect to Interlocutory Appeals, Originating Applications, certain Family Law matters, complex actions by leave when they satisfy certain objective criteria, actions where the amount in dispute exceeds an appropriate monetary value, and criminal matters, by leave.

DISTRICT COURT

Jurisdiction to try all Civil and Criminal actions. Judges assigned to a specific circuit may be assigned, from time to time, to hear cases in any court facility within the circuit.

PROVINCIAL COURT

Unified over time to try Civil and Criminal cases now within its jurisdiction with the exception of Family Law matters, which will be moved into an expanded District Court.

3. COURT OF APPEAL

The caseload of the Court of Appeal, as presently constituted, has become unmanageable. The pending cases have increased from 2,323 in 1983-84 to 2,793 in 1985-86. The load of cases puts an unconscionable burden on the Judges charged with the responsibility of giving appropriate consideration to the important issues involved in those cases. The number of Judges and panel now in the Court of Appeal leads to concern about the possibility of conflicting decisions from different panels. The Society therefore recommends the creation of an Intermediate Court of Appeal (see infra) and that the Court of Appeal be reconstituted as follows:

(a) The Court of Appeal to sit in Toronto and to be made up of nine (9) Judges;

(b) The Court to sit in panels of at least five (5) Judges;

(c) Serious criminal cases and appeals involving constitutional and other serious matters may go directly to the Court of Appeal from the Trial Court either as of right in certain cases and/or by leave in other cases, such leave to be based on certain fixed objective criteria;

(d) Other cases reaching the Court of Appeal will be by way of leave, where the amount involved exceeds $25,000.00, or there is a significant issue of law involved and, as well, by way of leave, using criteria similar to that which governs leave to the Supreme Court of Canada.

(e) The function of the Court of Appeal is to be a supervisory court.

Whether the Court of Appeal should be called the Supreme Court of Ontario and different labels attached to the Intermediate Court of Appeal, the Supreme Court (High Court), or the District Court, is a matter for those drafting the final re-organization of the System. For the purpose of this report, we will use the labels "Court of Appeal", "Intermediate Court of Appeal", "Superior Court", "District Court" and "Provincial Court" for the purpose of making it easier to understand the changes in structure proposed.

4. Intermediate Court of Appeal:

This Court would be centered in Toronto, but would sit in the Circuit Centres as required. It would sit in panels of three (3) or five (5) Judges. It would hear all appeals from the Supreme and District Court as well as perform the appeal function of the present Divisional Court, with the exception of Interlocutory and Provincial Civil Court Appeals.

5. Superior Court:

This Court will remain as a Trial Court, centred in Toronto. It will travel to the Circuit Centres (or other Court facilities as required). The cases, trial dates and place of sittings will be controlled through a centralized court

administration system utilizing state of the art technology and business management methods. The jurisdiction of the court will be as of right where the amount involved exceeds an appropriate monetary value, certain Family Law matters (see Family Law section), other complex civil matters by leave, cases where important matters of law are involved; or, criminal matters with leave. Objective criteria will be set for granting leave. This Court will have the jurisdiction of the present Divisional Court with respect to Originating Applications, Interlocutory and Provincial - Civil Court Appeals.

6. District Court:

The District Court will have an unlimited jurisdiction in Family Law, Criminal and Civil matters. The District Court will have three divisions, Criminal, Civil and Family Law. The District Court, in each Circuit, will be organized under a Chief Judge, with an Administrator, to organize and utilize all the court facilities and judicial manpower within the Circuit.

7. Provincial Court:

A phased-in merger of the Civil and Criminal Divisions into one Court presided over by one Chief Judge.

The jurisdiction of the Provincial Court in civil matters to be increased to include cases where the amount in dispute is up to $5,000.00 and up to any amount with the consent of the parties. The jurisdiction is to apply throughout Ontario.

All Family Law matters are to be removed to the expanded District Court.

Court administration to be under the control of the Chief Judge. All technology and business management concepts presently available in private industry to be made available to the court administration for the most effective use of the court facilities and judicial manpower.

The salaries of Provincial Court Judges to be increased in order to continue to attract highly qualified practitioners.

Judges may be rotated between the Criminal and Civil divisions and within circuits as may be required by the Chief Judge.

8. CASE MANAGEMENT

If airlines can reserve seats for different classes of passengers, for return trips around the world, months in

advance, the task of allocating and monitoring of courtrooms throughout the Province appears to be an achievable one.

It is the Society's recommendation that whatever state of the art technology and business methods are available, be employed, to most effectively utilize court facilities and Judges' time. It must be recognized that additional judicial appointments and physical courtroom facilities may be required. The cost of upgrading and computerizing the administration must also be recognized.

With the use of computers, counsel, whether through their own terminals or through inquiry at the courthouse terminal, would know at any stage what judges and courtrooms are available. Litigants who wish to go on a standby list to be heard on short notice, could track the pending cases so they could proceed to trial on short notice.

Actions may be set down for trial, after being certified ready by a Pre-Trial Judge, by Court Order, or Consent of the parties. Once an action is set down for trial, the venue of the trial may be changed on Consent or by Order to any convenient County seat, on reasonable notice, to facilitate early trial and full use of available courtroom space and "Judge time".

Examinations for Discovery and production of documents will not be required, except by leave, in cases involving less than $50,000.00, (Except in Family Law matters - see Family Law section). The Rules of Civil Procedure should mandate certain documents which must be produced in each case together with mandatory responses to requests to admit. The Examinations for Discovery and production can be held, in any case, on agreement of the parties, or as may be ordered by a judge. Full production and discovery will apply in all cases which proceed in superior court.

Appeals will be scheduled to be heard as soon as they are perfected. Any party may move, at any time during the pendency of an appeal, to deal with any issue which might lead to early resolution of the appeal, or an issue in the appeal, or reduce the cost of proceeding with the appeal.

9. JUDGES

(i) There will be no formal residency requirement with respect to appointment of judges. Judges may be expected to move within a circuit to courtroom facilities

located within the circuit, on reasonable notice.

(ii) Specialization - Although the Society agrees that it is desirable to have judges interested in and familiar with specific areas of the law, it is opposed to institutionalized specialization. It is felt the present system of the Senior Judge assigning judges to caseloads in their preferred area of interest, rather than isolating them in those areas, helps to maintain some variety of experience for all of the judges without limiting or restricting them to one particular area of law.

(iii) After appointment, judges should undergo an orientation course of at least three (3) months, the curriculum of which is to be prescribed by a committee of Senior Judges. Judges are to have the option of retiring, on reasonable pension, after fifteen (15) years of service.

10. JURIES

The Society strongly recommends that no matter what changes are made in the system, the civil jury be retained. The influence of the civil jury, even though its use may be limited, is a salutary influence on litigants, judges and counsel.

11. ARBITRATION and MEDIATION

Voluntary arbitration and mediation procedures should be available and provided for in the Rules of Civil Procedure. Arbitration should not be compulsory. In order for this Province to retain the confidence of the international community, it must be seen to have dispute resolution available in open court where binding and universally applicable rules of law are available to all litigants. Arbitration does not create a body of law, does not have the same effective rules and procedure and projects to the outside community the image of a closed, arbitrary, unpredictable society.

PART III

FAMILY LAW DISPUTES

A. PRESENT SYSTEM OF THE ADJUDICATION OF FAMILY LAW DISPUTES

1. NATURE OF FAMILY LAW DISPUTES

We are in a time of change. Over the course of the last twenty years our society has become increasingly more complex and the individuals in society must cope with not only the rapid change in pace but the increasing complexity that this change brings to our society. Years ago family law disputes were rare: spouses did not separate or divorce; women and children were regarded as chattels of the husband and father; and the family unit remained intact. Today people have choices in terms of life style and career goals. Women and children have their own separate and distinct rights. In this age of choices and equality, a large percentage of marriages end up in separation and divorce. Our society must address the adjudication of the disputes that inevitably flow from the increasing proliferation of family separations.

Marriages are now regarded as economic partnerships. The Family Law Act has increased the commercial character of family law disputes. Parties now must retain the assistance of accountants, actuaries, business valuators,

tax specialists and numerous other commercial experts to assist them in the processing of their cases. In the Supreme Court and District Courts the majority of family law disputes which proceed to trial are now basically commercial disputes. The bulk of trials in Provincial Court (Family Division) relate to child welfare matters or young offenders.

2. ALTERNATE DISPUTE RESOLUTION

In addition to the methods referred to in Part II of this brief, the following factors have served to promote settlement of Family Law disputes:

(1) Assessments in Custody Disputes

In 1982 the Children's Law Reform Act introduced the concept of court ordered assessments when the issue in dispute concerned custody and access. Prior to this time psychiatrists, psychologists and social workers were used by a limited number of family law practitioners to assist in the settlement process. Once an assessment report has been completed, it is available for the trial judge if the parties are unable to agree as to the resolution of their dispute. Since this procedure can be imposed by court order

regardless of consent, it has resulted in the settlement of most custody/access disputes.

(2) Legislative Removal of Conduct as Significant Element in Family Disputes

The Divorce Act, 1985 has essentially alleviated the necessity to use fault grounds as a basis for obtaining a divorce. Increasingly, parties that want their marriage dissolved will do so on the ground of one year separation. The necessity for delving into the problems that the parties faced in the marriage has been in large measure eliminated.

The Divorce Act, 1985, The Family Law Reform Act 1978 and the Family Law Act 1986 have also in large measure removed conduct as an element in support disputes. It is very rare that either spouse would attempt to assert that the conduct of the other was such that it amounted to a "gross repudiation of the marriage". Support issues are generally now decided on financial consideratons without regard to conduct.

In custody matters the introduction of court ordered assessments and the increasing use of mediators has eliminated to a great extent contested custody battles.

3. COST FACTOR TO FAMILY LAW LITIGANTS

In addition to the factors set out in Part II of this brief, the following factors have contributed to the increased cost of family litigation:

(1) The Family Law Act, 1986

Part 1 of the Family Law Act has set up a scheme of division of property that imposes an obligation on spouses separating or divorcing to retain the services of numerous commercial experts at the very outset of their dispute. Family law lawyers are duty bound to advise their clients to ensure that all of the necessary experts are retained. The family law lawyer must ensure that he or she has reviewed with his or her client in detail all of the financial circumstances of that client. Mr. Justice Galligan in Silverstein vs. Silverstein (1978) 1 RFL (2d) 239 states as follows:

> "I think that at the very beginning of cases under The Family Law Reform Act the profession should realize the necessity of giving full complete and up-to-date information in the statements required by those sections. In the statement of property filed by the husband in this case, the value of certain property is put in at its book value, which is the depreciated cost value according to the books maintained by the companies in which he is interested. That value is useless and in my opinion is not a particular of property that complies with the intention of the legislature when it enacted s. 5. Form 10--which

is the document required by R.775c--requires the party filing a statement of property to take one's oath to the "Estimated Value" of the property. That means its estimated current market value, not what it cost years ago, less its accumulated depreciation. The statement of property filed by the husband gives no indication of what the property is actually worth to him at this time.

It is my opinion that the legislature of Ontario, by enacting ss.5 and 23 of the Family Law Reform Act, intended to require that full complete and up-to-date information be provided to the opposite party and to the court at the earliest possible opportunity. Anyone who has had any experience with family litigation in this province knows of the tremendous amount of time and expense that is often involved in establishing the financial circumstances of the spouses. This case is typical. I am certain that it was the intention of the legislature to eliminate the waste of time and the expense involved in such inquiries by requiring early and complete financial disclosure.

I also note that the statements under both sections are required to be verified by oath or statutory declaration. It is my opinion, therefore, that a party filing such a statement must direct his or her mind to the contents of such statements at the time the statements are filed. Such statements must not be perfunctory pro forma documents but they must be real.

It seems to me that any party who does not comply with the letter and the spirit of ss.5 and 23 must realize that a court might very well draw unfavourable inferences against that party if a statement under those sections is less than frank and complete. Any unnecessary prolonging of proceedings because of the failure of such statements to be full, frank

> and complete ought to be at the cost of the person whose statement or statements are deficient. It is desirable that litigation relating to property and/or support ought not to be prolonged by extensive inquiry into a party's assets, means, income or needs. All of these matters ought to be capable of a speedy resolution based on full, complete, frank and early disclosure. I think a court should look with great disfavour upon a party who neglects to give that kind of disclosure in the statements required under ss. 5 and 23."

The net effect of the Family Law Act is to greatly increase the cost to family law litigants at the initial stage of a family law dispute since the parties must not only retain the services of commercial experts but, their respective solicitors must also engage in a detailed analysis of the financial circumstances in order to ensure that the requirement of full and fair financial disclosure has been met.

Section 56(4) of the Family Law Act states as follows:

> A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or

(c) otherwise in accordance with the law of contract.

The inevitable effect of this section is that full financial disclosure is not only desirable but mandatory in order that domestic contracts have some degree of finality and are not exposed to the risk of being set aside by a court in any subsequent dispute. The requirement of financial disclosure imposes an obligation on each party to assemble and produce to the opposing party all relevant financial material, a detailed financial statement summarising all aspects of his or her financial affairs, and a report of various commercial experts such as valuators, tax experts, etc. The work and effort involved in providing full and effective financial disclosure is substantial and costly.

(2) Interim Relief

Although in most civil litigation matters, interim relief is not usually required, it is virtually always necessary in family law cases. Moreover, the interim relief granted tends to have significant impact on the final outcome of the dispute. Given the present system, there is no alternative to family law litigants but to move for interim relief.

(3) Fragmented Jurisdiction

The Provincial Court has no jurisdiction to deal with property matters. If one spouse wishes relief in connection with custody and support issues only, that spouse may commence a proceeding in Provincial Court. The other spouse may want divorce and property division and can then commence a proceeding in District or Supreme Court. It is conceivable that the same family may be litigating issues in two separate courts. Alternatively, if all issues are to be moved into one court it must be to the District or Supreme Court thereby resulting in a complete waste of the time and effort involved in the Provincial Court proceeding.

The Supreme and District Courts have very little jurisdiction to enforce its own orders. Enforcement takes place at the Provincial Court level. If one party seeks to enforce while the other seeks a variation, the proceeding tends to move back and forth from one court to another. This results in duplication of time and effort and the attendant costs to the litigant.

4. COURT STRUCTURE

(1) Supreme Court of Ontario

(a) Family Law Division (Toronto)

The Family Law Division is located at 145 Queen Street West in the City of Toronto. It is a separate division of the Supreme Court of Ontario. All motions, pre-trials , and trials are heard in this facility. Family Mediation Service, which is an advisory service run by Helen Goudge, a competent social worker, offers advice on mediation facilities in custody matters.

The following are the advantages of the Family Law Division:

(i) Interlocutory matters are heard by Masters. Those Masters that concentrate on family law matters have acquired sufficient experience to be able to deal with issues expeditiously on an interim basis. Since one can choose any date for a motion before a Family Law Master, interim issues are dealt with quickly.

(ii) Family Law Motions Court is structured in such a way that ex-parte motions can be heard at 9:30 a.m. on any day, appeals from Masters are

heard on Wednesdays and urgent matters are heard on Thursdays. The waiting time is approximately four to six weeks for normal matters.

(iii) Family Law Commissioners currently preside over for case conferences and pre-trials. They are readily available and a case conference or a pre-trial date can be obtained with reasonable speed. On occasion they sit on trials although the necessity for this has been diminished by decreasing number of family law trials and the increase in feeling on the part of litigants and lawyers that, those cases that need adjudication should be adjudicated by a judge.

(iv) The trial schedule carries very little backlog. When judges are available, it is usually possible to know with reasonable certainty when the case will be reached for trial. This can be arranged by a brief meeting with the Trial Co-Ordinator.

The disadvantages of the Family Law Division are as follows:

(i) The facilities at 145 Queen Street West are grossly inadequate. The library is limited; the robing rooms are entirely inadequate; there are insufficient consulting rooms; the building itself is antiquated without proper air-conditioning facilities; the courtrooms are poorly furnished and poorly designed; there is no adequate waiting area for clients; meal facilities are limited.

(ii) Family Law Motions Court basically takes place in the judge's office. Frequently the litigants are excluded. The public is never admitted.

(iii) Although some attempt has been made to streamline the hearing of Master's Motions and Family Law Motions, frequently lawyers are forced to wait for lengthy periods before their matter is heard.

(iv) Although trial dates are generally fixed or relatively certain, the procedure becomes disrupted when no judge is available for the week or

date when a particular matter is scheduled for hearing.

(b) Outside Toronto

Outside of Toronto there is no separate family law facility. Family law cases go on the regular non-jury or assize list. Family law matters are usually relegated to the bottom of the list and, since the sittings outside of Toronto tend to be very short, they are rarely reached for trial. It is in fact almost impossible to get a family law case heard in the Supreme Court outside of Toronto.

(2) District Court

(a) Judicial District of York

More and more lawyers are commencing their matters in the District Court. Although previously there were not facilities for hearing Family Law Motions and particularly Motions for interim relief, in recent times these Motions take precedence over other Motions and are heard expeditiously. Pre-trials are conducted by the judges themselves whose authority commands more respect with litigants.

The only disadvantage of the District Court is that there are no adjunct facilities such as mediation facilities available in the District Court in the Judicial District of York.

(b) Outside the Judicial District of York

Most family law matters are heard by District Court Judges outside the Judicial District of York. Where both parties and both counsel practice in the District in which the matter is being heard, the procedure is expeditious.

The disadvantages are a follows:

(i) Judges sitting on cases where counsel are their close friends, and;

(ii) The degree of antipathy that judges in small communities may exhibit towards "outside" counsel.

(3) Provincial Court (Family Division)

The existing Provincial Court in the Judicial District of York contains a streamlined procedure with minimal interlocutory procedures and is suitable for less complex cases. Litigants in very simple matters can more easily represent themselves. There are court clerks to assist the litigants in completing the forms. Many Family Law Act cases move quickly through pre-trial usually with no discovery process. Trial dates can be fixed and a case may be reached for trial at an earlier time.

The disadvantages stem from the inadequate renumeration for the judges, the inferior physical facilities (lack of counsel and counselling rooms, lack of library, etc.). Further the system which has been developed for enforcement is completely unsatisfactory. Enforcement hearings take place months after the initial application is made. They result in many unnecessary court appearances and often leave the applicant with a feeling of complete frustration with the ineffectiveness of the legal system in enforcing its own orders. There is inadequate scheduling of trial time. Trials are often adjourned for various reasons related to the court rather than the litigants. Often one day of trial will be scheduled. If the trial is not completed in one day the second day will be some weeks down the road and so on. The informality of the procedure and the appeal process to a different court both create confusion and unsatisfactory results.

(4) Unified Family Court

The Unified Family Court was an experimental project set up in 1977 in the Judicial District of Hamilton-Wentworth. Hamilton-Wentworth is not necessarily a microcosm of the social and economic structure of Ontario, one of the largest provinces in Canada.

Although there is an advantage in all matters being heard in one court with adjunct facilities present, the disadvantages are numerous, examples of which are as follows:

1) The specialization of judges (see Section 3 of this Part);

2) The lack of differentiation between the simple and the complex cases.

The lawyers involved in the preparation of this brief unanimously rejected this model as a model to serve the entire province.

B. RECOMMENDATIONS

1. GENERAL

The issues which most frequently arise in the family law area are:

(a) property matters;

(b) support;

(c) divorce;

(d) custody and access;

(e) matters dealing with the welfare of children; and

(f) matters dealing with non-interference with the person.

With respect to each of these issues, a particular family matter can be simple or complex: or a case may become complex through the interaction of more than one of these issues.

Insofar as the courts deal with family law matters, the courts should be structured in such a way that simple family cases can be dealt with in a relatively summary way, while procedures exist to provide for the thorough and appropriate adjudication of more complex matters.

2. PARALLEL COURT STRUCTURE

(1) Jurisdiction

This model proposes that family matters be heard in the Superior Court and in the Family Division of the District Court. However, it is

important to note that one Court should not be considered a "superior" Court, and the other "inferior". So much as is possible, both Courts would be accorded the same status. The significance of the difference between the two Courts, at least for family law purposes, would be that one Court would be a more summary procedure Court, designed to deal expeditiously with simple matters, while the other Court would have more elaborate procedures and be designed for more complex cases.

Rather than attempting to delineate matters which must be heard by one Court or the other on the basis of subject matter, monetary jurisdiction or any other such parameter, it would be the Society's recommendation that a party be permitted to start <u>any</u> family law matter in the District Court. If the defendant or responding party did not take steps to move the matter from the District to the Supreme Court, then the matter would remain in the District Court and be dealt with by its procedures.

However, the applicant/plaintiff would have the right to begin the matter in the Superior the defendant/respondent would have the right to move the matter from the District to the

Superior Court if the case involves any of the following issues:

(1) where one or both of the spouses receives significant non-salary income;

(2) where there are significant assets other than the matrimonial home or homes, contents, etc. above an appropriate amount of money in dispute.

Further, we would recommend that either party have the right to apply for leave to move the matter from the District to the Superior Court on the ground that the matter involves complicated legal issues, or that there are factual circumstances which render the matter of sufficient complexity that it should be tried in the Superior Court.

Finally, if a case were begun in the Superior Court, but the defendant/respondent was of the view that it was a simple matter (though properly in the Superior Court), he could apply for leave to have it adjudicated in the District Court.

Either Court would have the power to grant a dissolution of marriage.

The above model would eliminate the necessity of a third tier of Court for adjudication of family matters. Those matters that were previously dealt with in the Provincial Court (Family Division) would be dealt with in the District Court through its simplified procedures. Essentially the District Court would absorb the functions presently performed by the Provincial Court (Family Division). Court personnel should be made available to assist those litigants that wish to represent themselves in those very simple matters where legal representation is unnecessary or not desired by the litigant. The adjunct services presently available through the Provincial Court (Family Division), as for example mediation and assessment facilities and credit counselling services, would be available through the District Court. The above model also assumes that the Support and Custody Orders Enforcement Act would be fully implemented so that the majority of enforcement procedures would be handled through the mechanisms set up under the Act as opposed to through a Court facility.

(2) Procedure

The Society recommends that the two Courts share common administrative services and adjunct

services (for example, mediation services, counsellors, family assessment experts).

The District Court would have simplified forms and a summary procedure. There would be no right to discovery, except by leave, and interlocutory proceedings would be discouraged by providing that only urgent matters would be dealt with on an interlocutory basis, with leave. Before the hearing of an interlocutory matter, the parties would file affidavits, but would then appear at the hearing of the motion, at which time the Judge might hear viva voce evidence, at his or her discretion.

The Rules of the District Court would provide for a reasonably simple Financial Statement, and would also provide that the usual financial documents be produced at the outset as a matter of course (for example, income tax returns, paystubs, bank statements, real estate appraisals, etc.).

The procedure would adopt the best aspects of the procedure which presently exists in the Provincial Court (Family Division), and it would be hoped that a matter could proceed to trial within about two months of commencement, at a minimum of expense to the litigant.

The procedure in the Superior Court would encompass more complete pleadings, full rights to discovery of parties and documents, and greater access to interlocutory relief pending trial.

Interlocutory proceedings would be usual in this Court, and the Society recommends that such motions be processed as at present in the Supreme and District Court system (that is, by way of affidavits with the right of counsel to cross-examine). In the case of interim custody, however, the Society recommends that the parties be present at the return of the motion, and that the judicial officer hearing the matter hear viva voce evidence at his or her discretion.

The Society recommends that all interlocutory motions take place in open Court, and that the parties have the right to be present and hear the argument.

The Society recommends that all pre-trial motions in the Superior Court be dealt with by Masters, and that pre-trials and trials be presided over by Judges. The Society recommends against the continuation of the Family Law Commissioner system, which is an anomolous extra layer in the system.

As in the District Court, the Society recommends that the procedures in the Superior

Court provide that the usual financial documents be produced as a matter of course, without any request being made or Order being necessary.

The Society recommends that each Court have the power to enforce its own Orders. The existing system, in which one Court can enforce the Orders of another, is unnecessarily complex and convoluted.

As regards pre-trials, these should continue to be encouraged, and should be presided over by a Judge of the appropriate Court. In the District Court, a pre-trial would take place immediately after the exchange of pleadings, in the hope that the matter may be resolved very quickly at this stage. In the Supreme Court, the Society recommends that the pre-trial take place after discovery, as is the present system in the Superior Court and District Court.

If settlement is to be encouraged, it is essential that a pre-trial be presided over by a Judge. It is the experience of family law lawyers that parties are more likely to settle when they know that the recommendation for settlement is being made by a Judge, rather than by some "lesser" judicial officer such as a Family Law Commissioner.

There should be a separate scale of costs in each Court to reflect the delineation between simple cases dealt with in District Court and complex cases dealt with in Superior Court.

The advantages of such a system, would be at least the following:

(a) the system would reduce costs and promote speedy resolution of simple matters, while providing full procedures for determining the facts in the more complex case;

(b) the system would eliminate the multiplicity of proceedings and jurisdictional overlaps which presently exist;

(c) the decisions of the Superior Court would set the law and provide guidance for the profession and for the District Court. The Rule of stare decisis would continue to govern;

(d) the system would promote respect for the judicial system, as routine matters could be dealt with in an inexpensive, summary way, while litigants who wished

to have their more complicated matters fully developed would have the right to do so;

(e) the system should overcome the common objection that there is a "law for the rich and a law for the poor", as there would be no distinction between the two Courts in monetary terms, the basic distinction being rather on the basis of simplicity or complexity of issues.

3. SPECIALIZATION OF JUDGES

Judges should be experienced and impartial. Specialized judges are undesirable in any field but particularly in family law for the following reasons:

(1) Family law matters have a tendency to become emotionally draining, taxing and depressing. A judge must preside over a case, usually involving financial matters, but between two people that presumably were close at one time in their lives. There is a serious risk that judges that hear family law cases on a day to day basis might suffer from either boredom or burn-out. This might affect the judge's ability to bring his or her full expertise and

concentration to each case as it is tried before him or her.

(2) Most people in our society have had close personal experience with people who are separating or divorcing, as this becomes a significant social phenomenon in our society. As we experience the separation of friends or relatives that are close to us, we tend to formulate our own views as to what is equitable between separating spouses. Judges, like other members of our society, have probably been affected in some way by a marital break-up. It is no doubt part of human nature that they might bring their own value systems into the adjudication of a family law dispute. It is therefore important to have many different judges from different backgrounds in order to ensure there is a broad range of value systems applied to the adjudication of family law matters.

(3) As our society becomes more sophisticated economically, more and more people find within the context of a marital break-up, that their business affairs must come under close scrutiny. The adjudication of a family law dispute must, of necessity,

involve a consideration of the widest possible range of subjects including but not restricted to corporate law, real estate law and tax law. Judges who have had experience in adjudicating business law issues in other contexts and from other perspectives would, we believe, find such experience of great benefit to the adjudication of family law issues.

(4) If judges become experts in family law as would no doubt be the case if we had specialized family law judges, the need for assistance of counsel making submissions on the law would be diminished. They would be more likely to draw on their own experience and less on the submissions made to them by counsel. This could in turn result in a fundamental change in the method of adjudicating family law matters.

(5) If we have a small group of specialized judges adjudicating family law matters, it is likely that in due course these judges will develop their own rules, many of which are informal. We have already experienced this in the Family Law Division in Toronto. Counsel who do not regularly appear before these judges might be at a disadvantage if

they are ignorant of these unwritten rules. This might in turn adversely affect those clients who chose solicitors who do not appear on a regular basis before these specialized judges.

We therefore recommend that judges be appointed to each court and that each court be empowered to hear all cases, whether criminal, civil or family. However, if there is a separate division of each court to hear family cases, judges should be assigned to such division for a period of six months. They will therefore have the opportunity to develop familiarity with family law cases and provide continuity in the process, while avoiding the pitfalls of specialization.

4. CASE MANAGEMENT

The Society considered the concept of "case management", a system in which every case is assigned to a particular Judge immediately upon the action being instituted, and that same Judge deals with all interlocutory matters as the case proceeds to trial.

The Society recommends against such a system, for the following reasons:

(a) in family law matters, where there is a tremendous emotional overlay to the litigation (particularly at the outset), there would be a risk that the case management Judge would develop an initial

impression of the case which may be inaccurate, but which would then carry through and colour the case as it proceeded through the system;

(b) from a practical standpoint, it would be more difficult for litigants to have matters heard in a simple and expeditious way, since the case management Judge would have to be located and arrangements would have to be made on an individual basis in the case of every interlocutory proceeding. One can imagine the procedural delays in the event that the Judge was on vacation, otherwise indisposed, or involved in a lengthy trial;

(c) the Society does not accept the rationale that a case management system would necessarily mean that there would always be a Judge who had the full history of the case in his or her memory: if all Judges have a caseload of cases which they were managing, it would be difficult for the Judges to retain the facts of each and every case.

PART IV

CRIMINAL LAW

A. INTRODUCTION

The Criminal Law Committee endorses the goal of the Commission to provide for a "simple, more convenient, more expeditious and less costly system of courts for the benefit of the people of Ontario".

The legal maxim, "justice delayed is justice denied", is now enshrined in the Charter. Whatever changes are made to the existing court structure in Ontario, the rights of accused persons must be protected and preserved in spite of any extra costs that may be imposed to preserve those rights.

B. COURT STRUCTURE

1. Court of Appeal:

The Committee endorses the general recommendation of the Society with respect to the Court of Appeal. It recommends the Court sit in panels of at least seven (7), to deal with Criminal Law cases. It also recommends that direct access

from a Trial Court to the Court of Appeal should be easily available to accused persons in serious indictable offences and particularly in cases where the liberty of the subject is involved.

2. Intermediate Court of Appeal:

This Court would hear all appeals in indictable matters following a trial with either the Provincial Court, District Court or superior court. All appeals from the superior Court, exercising its supervisory functions, would come to this Court, subject to the right to go directly to the Court of Appeal, as set out above.

3. Superior Court:

At present, a single Judge of the High Court exercises a supervisory function in Criminal matters, primarily as a result of applications for Prerogative Writs such as habeas corpus, certiorari, mandamus and prohibition. However, aside from the Writ of habeas corpus, which is specifically preserved by the Canadian Charter of Rights and Freedoms, it is the recommendation of the Society that study be given to abolishing other forms of Prerogative Writ and that the superior court Judge be given jurisdiction to exercise the following supervisory functions:

(i) Applications for habeas corpus;

(ii) Concurrent with the District Court or as an alternative, where no charges are laid, a review of the issuance of a search warrant;

(iii) Concurrent with the jurisdiction of the District Court, a review of wire tap authorizations where a trial is conducted in this Court;

(iv) All bail reviews as provided by the criminal code;

(v) Applications to quash the Order of a Provincial Court Judge following a preliminary hearing requiring an accused to stand trial, with a wider jurisdiction to reverse such Orders than currently exist;

(vi) All summary conviction appeals.

4. The District Court:

The District Court will have jurisdiction for trials of all indictable matters where a trial in Provincial Court has not been elected. In certain cases, due to their nature or complexity, trial in the Superior Court may be the preference of the Attorney General or the accused. It is the recommendation of the Society that the system permit such cases to be tried with leave of either the Chief Judge of the District Court or the Chief Justice of the superior court, upon application, subject to certain objective criteria.

C. JURIES

In Criminal matters, it is recommended that juries remain at twelve (12) persons with two (2) alternates; rather than the current situation which permits juries to be depleted to ten (10) before a mis-trial is declared. The current system for selection of jurors, including challenges for cause, should be expanded. Formal rules should be established for utilization of the Criminal Code provisions to deal with preliminary motions, prior to the selection of a jury.

D. CASE MANAGEMENT

The Society's general recommendations relating to fixed trial dates, professional case management facilities, pre-trial conferences, as otherwise set out in the report, should apply to criminal matters.

E. PROVINCIAL COURT

1. Structure:

The Provincial Courts of Ontario are divided into three divisions, each with its own Chief Judge. There are 154

Judges in the Provincial Court (Criminal Division), 74 Judges in the Provincial Court (Family Division) presiding in central and satellite court facilites throughout Ontario, and 13 full-time Judges in the Provincial Court (Civil Division) presiding in Metropolitan Toronto, Ottawa, Hamilton and St. Catharines.

The role of the judiciary in the Provincial Courts, like that in the other Courts, "... has developed from a dispute resolution mechanism to a significant social institution with an important Constitutional role which participates along with other institutions in shaping the life of its community".[1]

Any change in the structure of the Courts of Ontario, and particularly the Provincial Courts of Ontario, must recognize:

1. The public has its greatest exposure to the administration of justice through the Provincial Courts. More than 80% of all cases that come before all levels of the courts of Ontario are brought to these Courts. The Provincial Courts play a critical role not only in the adjudication of individual cases and the protection of our fundamental values, but also in maintaining public confidence in the administration of justice.

---

1. Shetreet and Deschenes (eds.) 1985, Judicial Independence; Contemporary Debate, at 393.

2. The Provincial Courts of Ontario have been given increasing jurisdiction in the last two decades. They maintain the volume of their caseload through the utilization of summary procedures, the specialization of its Judges, and satellite facilities.

3. As with all of the Courts, the problems confronting the Provincial Courts in large urban areas, and the solutions to some of them are distinct from the problems facing the Provincial Courts in urban areas, and the solution to their problems.

In most centres a courtroom or a judicial day is reserved for the assignment of cases for trial once the accused has retained counsel. Trial dates are routinely overbooked in anticipation of some trials not proceeding.

Trial lists still collapse after the best attempts at scheduling. There are reasons that contribute to the problem, which include:

more pleas than expected;

failure of the accused to appear;

illness of witnesses;

refusal of complainants to testify;

change of counsel shortly before trial;

erroneous trial estimates by counsel;

technical defects in the information;

inadequate disclosure; and,

withdrawal of charges at the request of the Crown.

Greater and more effective use of assignment courts, mandatory disclosure, pre-trials in matters involving indictable offences, and duty or plea courts could substantially relieve the inefficiency created by the recurrent type of reasons.

2. Provincial Court Judges:

Provincial Court Judges are lawyers who are appointed by the Provincial Government. Judges in higher courts are appointed by the Federal Government. There exists a substantial pay differential between the Provincial Court Bench and the higher courts. As a result, the Provincial Court Bench is not as attractive an appointment to many members of the Bar, even though the Provincial Court is responsible for processing the greatest number of cases in the Province.

It is recognized that, due to time constraints and the large volume of cases which have to be dealt with on a daily basis, that Provincial Court Judges are, at times, reluctant to engage in pre-trial conference and plea discussions. Cases find their way to a higher court that could easily be resolved at the Provincial Court level if Judges were more accessible.

The current system requires Provincial Court Judges to

preside over the same court, or circuit of courts, without any opportunity to rotate with other judges in the Province. As a result, these judges are required to work with a relatively select number of prosecutors, with whom they may socialize or with whom they may have personality or other conflicts. Exposure to a small defence bar may raise the same problems.

3. Recommendations:

1. Provide the same Legal Aid Tariff for Trials and Provincial Court as now exists in District Court.

2. Provide for a designated Plea Court.

3. Provide for Pre-Trials to be mandatory, in all matters, but summary conviction matters, where they will be optional at the request of the accused. The right to pre-trial may be suspended in areas where the number of judges are insufficient to provide that a trial be held by a judge other than the pre-trial judge.

4. In matters of significant importance, leave of

the Chief Justice of the Superior Court of Ontario, or designate, may be given to bypass the Intermediate Appellate Court to allow direct appeal to the Court of Appeal. In serious indictable offences, it is contemplated that direct access to this Court should be readily available to the accused person, rather than going through the Intermediate Court.

5. A restricted list of criminal offences may be heard in the Superior Court with leave.

6. Preliminary hearings be preserved.

7. That consideration be given to studying a change in the test for commital for trial to be on the basis of probable guilt, rather than upon the existence of any evidence on which a jury, properly instructed, could convict.

8. For recommendations relating generally to the Provincial Court, see Provincial Court recommendations at page 32.

F. JUSTICES OF THE PEACE

Justices of the Peace are not lawyers. Rather, they are trained lay persons who are primarily responsible for the issuing of processes under the Criminal Code and other related statutes. For the most part, they carry out their roles in the judicial system in an efficient and expeditious manner. However, three areas are of particular concern to the Criminal Bar:

(i) The issuing of search warrants:

Section 8 of the Canadian Charter of Rights and Freedoms protects individuals from unreasonable search or seizure. The issuance of search warrants is a function of a Justice of the Peace. By virtue of amendments to the Criminal Code, effective December 1985, search warrants may now be issued by telephone. Other federal statutes now, or will ultimately, contain their own search warrant provisions in light of the Supreme Court of Canada decision in Hunter v. Southam Inc. Therefore, the power of the Justice of the Peace to issue a search warrant is of particular concern, having regard to its constitutional significance.

Unfortunately, the rules relating to the issuing of search warrants, the hearing of returns by Justices of the Peace, and the review of such functions by a

higher court are unnecessarily vague, complex and cumbersome. The following are examples of difficulties with the current system.

At the present time, no central registry exists to keep track of search warrants once they have been issued nor to ensure that immediate returns are made, following execution, as required by statute. In addition, ease of accessibility to copies of the warrants and especially the information sworn in support of the warrants varies from jurisdiction to jurisdiction. The rules relating to challenges to search warrants are also unclear. At the present time, the primary route for challenging a search warrant is by way of prerogative writ to the High Court. There is some authority for the proposition that a trial judge has no jurisdiction to review a search warrant to quash it, if it is defective. Such applications must be made to the High Court. However, trial judges are often called upon to rule on the reasonableness of searches and to determine the admissibility of evidence in light of s.24 of the Charter.

It is therefore the recommendation of the Society that the entire search warrant process should be restructured to remedy the above problems. In particular, fixed rules should be applied for Justices of the Peace to follow in issuing the warrants and holding the returns in relation to them. As well, the function of reviewing search warrants should be given to trial judges to deal with, either in the context of a charge which

follows the execution of a search warrant or, alternatively, to deal with the validity of the search warrant in the absence of a charge.

(ii) Bail hearings:

In the Municipality of Metropolitan Toronto, contested bail hearings under the Criminal Code are conducted by Provincial Court Judges. However, in other centres, Justices of the Peace preside over such hearings. Because a bail hearing involves the liberty of the subject, it is the recommendation of the Committee that this function should be exercised by Provincial Court Judges and not by Justices of the Peace.

(iii) Case Management System:

It is the recommendation of the Committee that Justices of the Peace should be utilized, in terms of case management, within the Provincial Court system. This includes such administrative matters as setting trial dates, controlling trial lists, presiding over uncontested bail hearings, varying existing bail orders and other similar functions. It is the further recommendation of the Committee that a professional case manager, be it a Justice of the Peace or otherwise, should be responsible for the processing of all cases at this level.

Page

PART V

APPENDIX

1. ACTIVITY SUMMARY OF VARIOUS COURTS (1983 - 1986)*

(i) Supreme Court 79 a

(ii) District Court 86

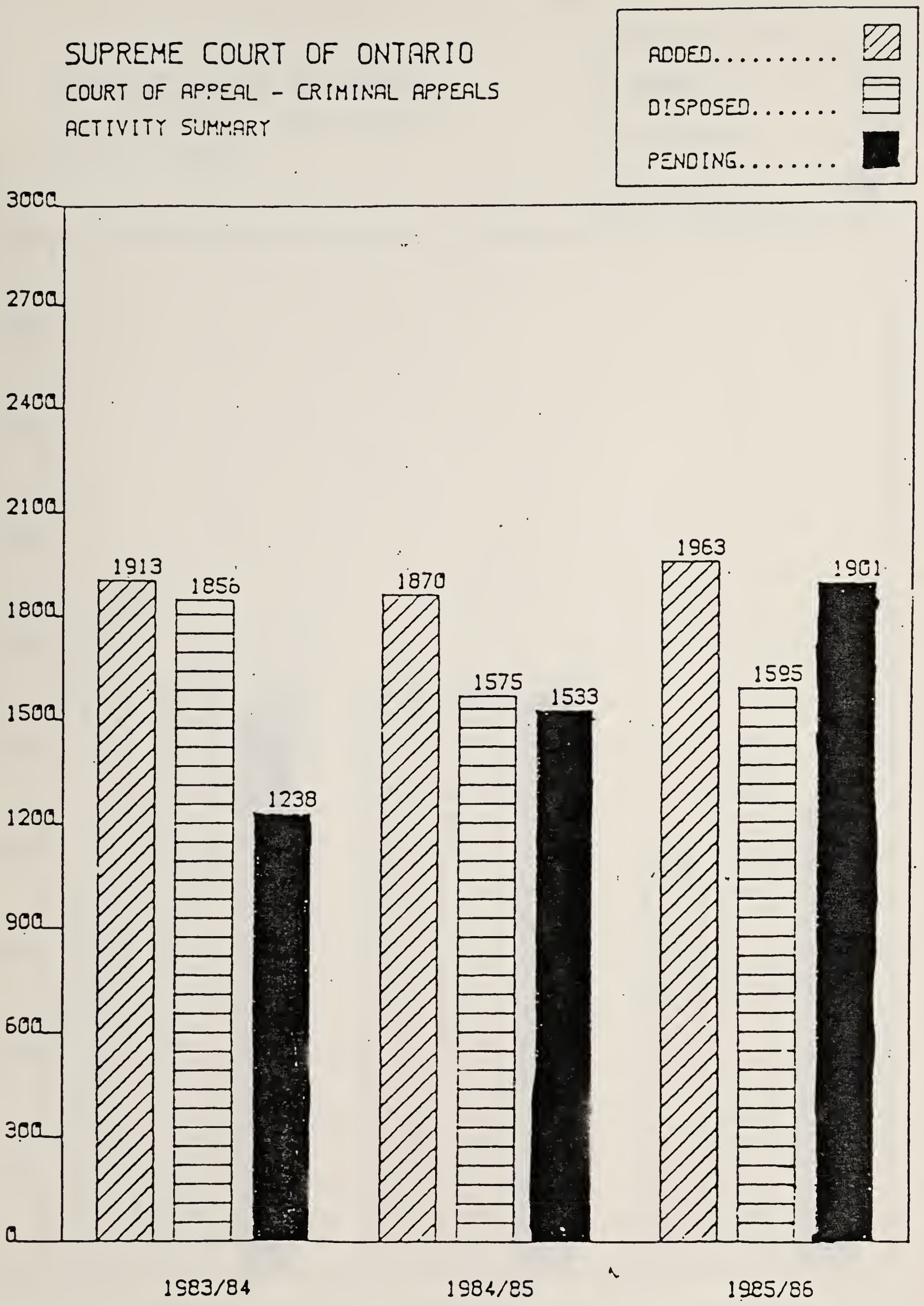
(iii) Provincial Court 91

* Ministry of the Attorney General, Court Statistics Annual Report, **Fiscal Year 1985/86**

SUPREME COURT OF ONTARIO

COURT OF APPEAL - CRIMINAL APPEALS

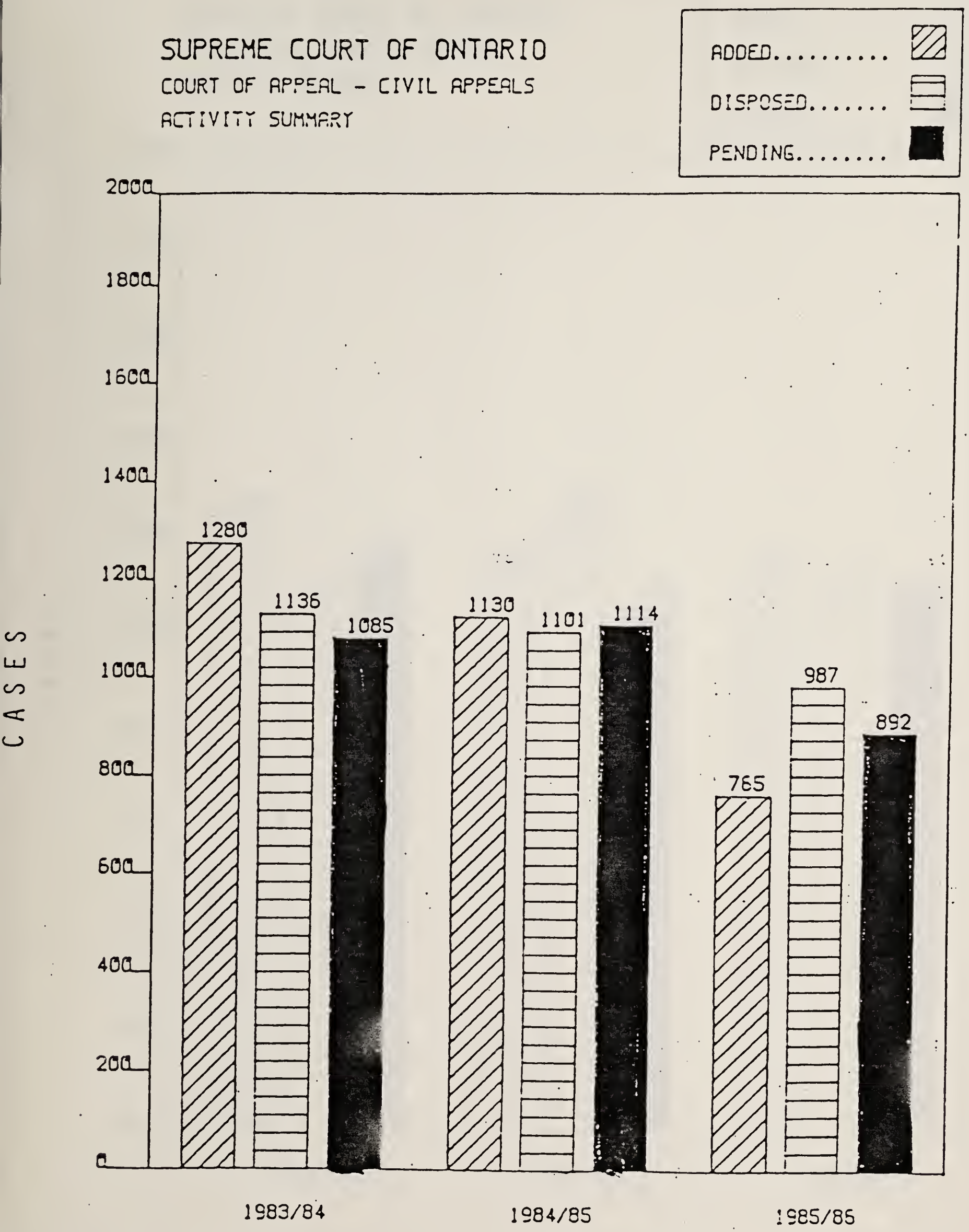
ACTIVITY SUMMARY



SUPREME COURT OF ONTARIO

COURT OF APPEAL - CIVIL APPEALS

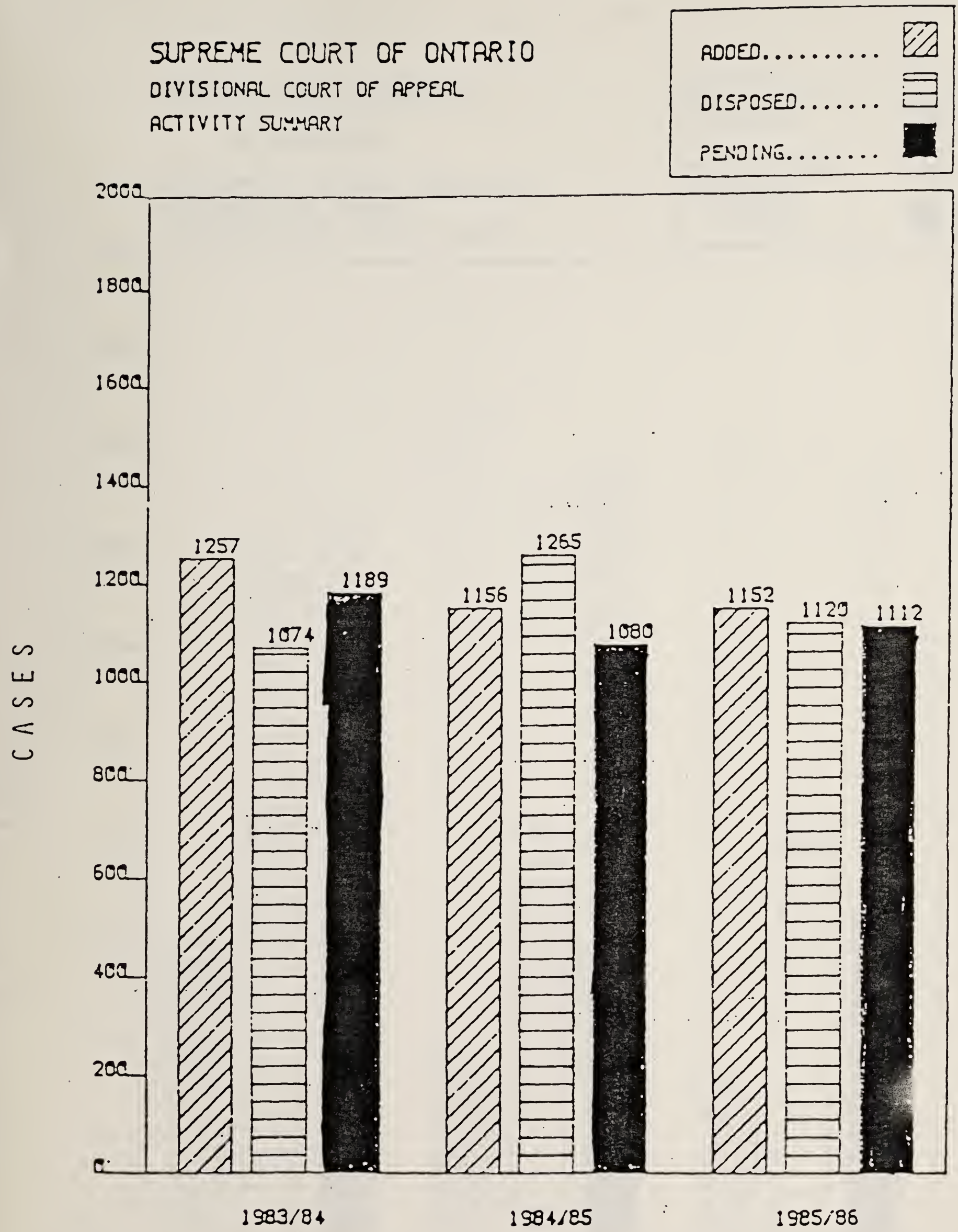
ACTIVITY SUMMARY



SUPREME COURT OF ONTARIO

DIVISIONAL COURT OF APPEAL

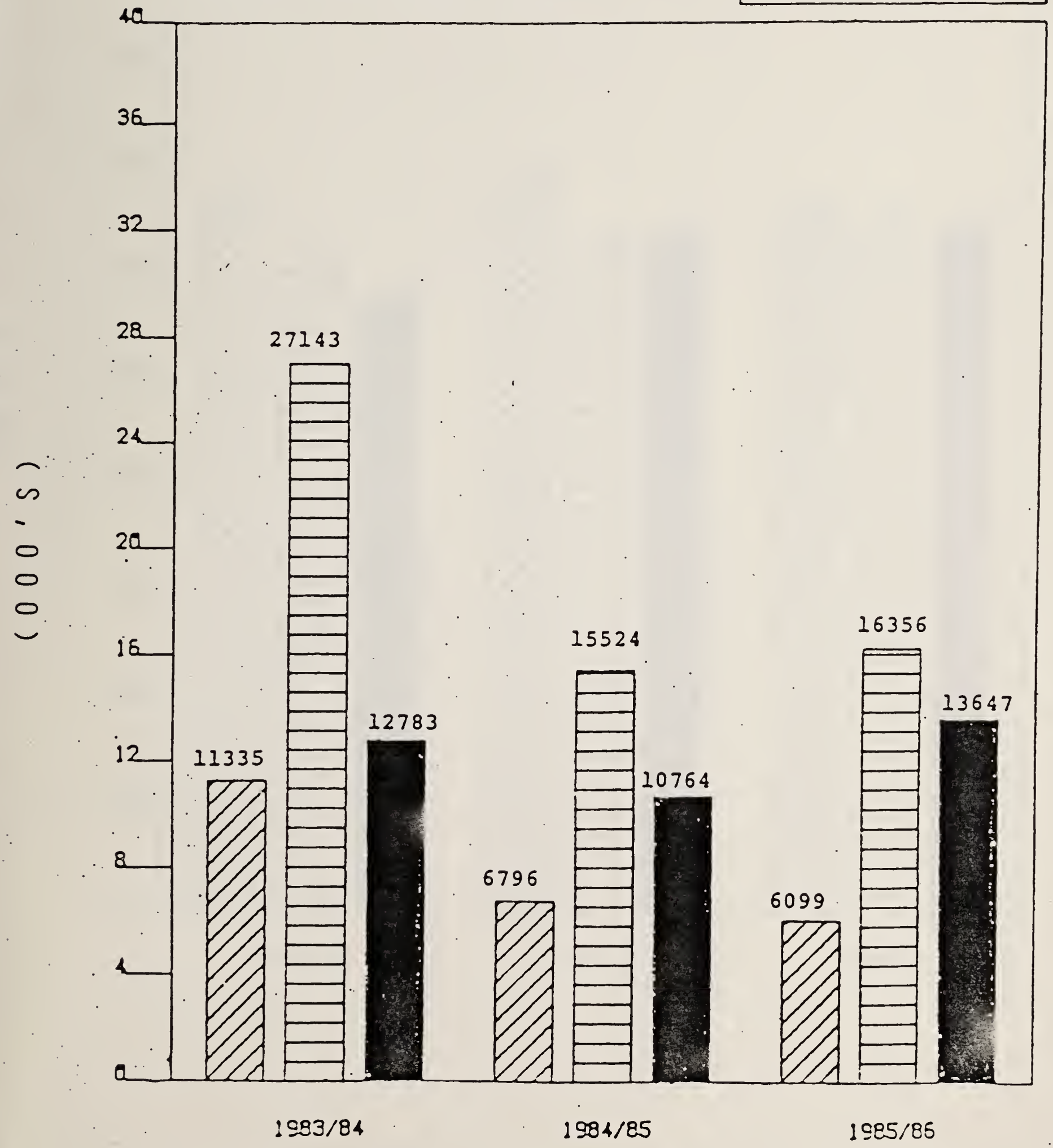
ACTIVITY SUMMARY



SUPREME COURT OF ONTARIO

IN BANKRUPTCY

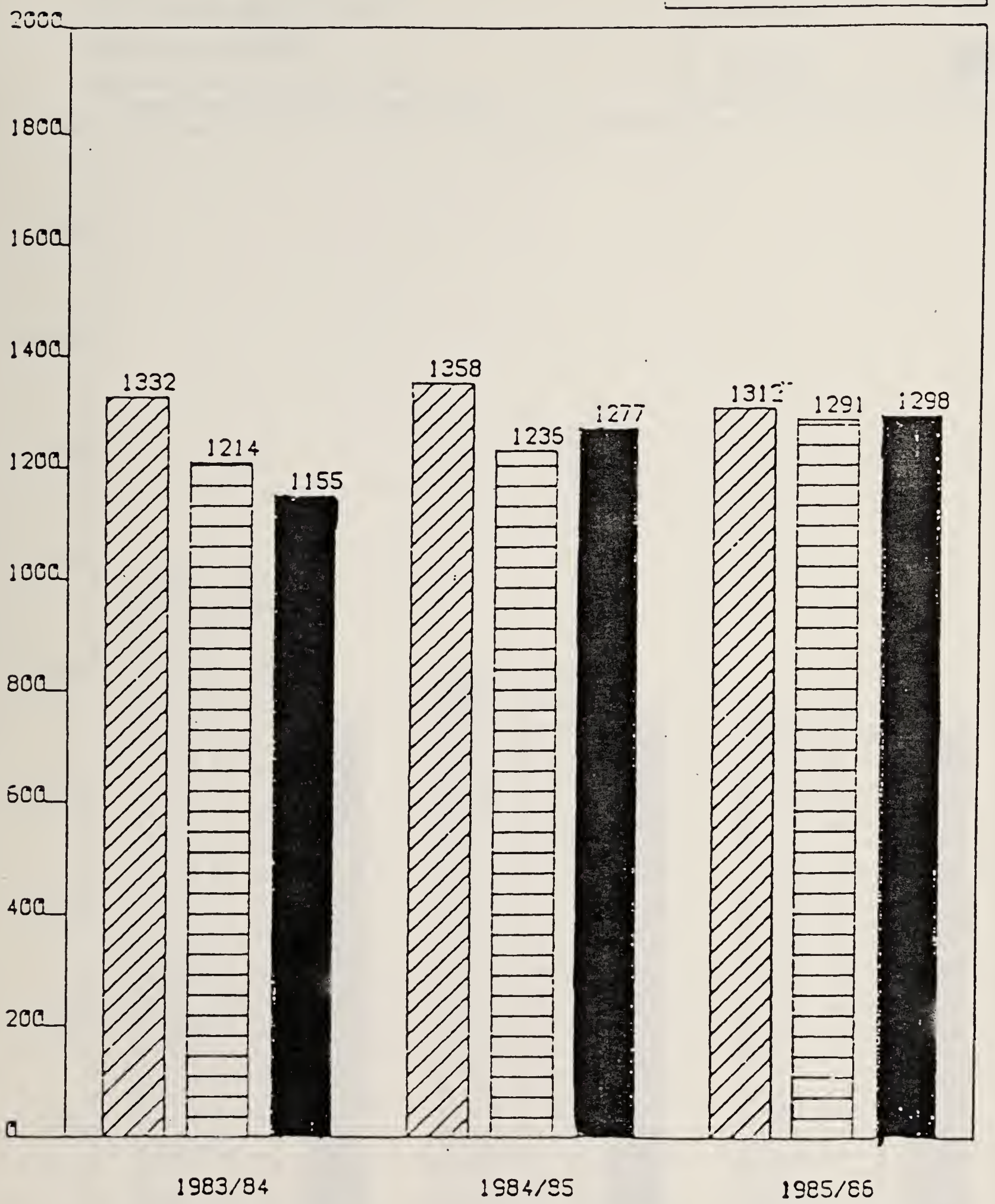
BANKRUPTCY ESTATES COMMENCED
APPLICATIONS FILED
JUDGMENTS AND ORDERS ISSUED



SUPREME COURT OF ONTARIO

CIVIL JURY ACTIONS

ACTIVITY SUMMARY

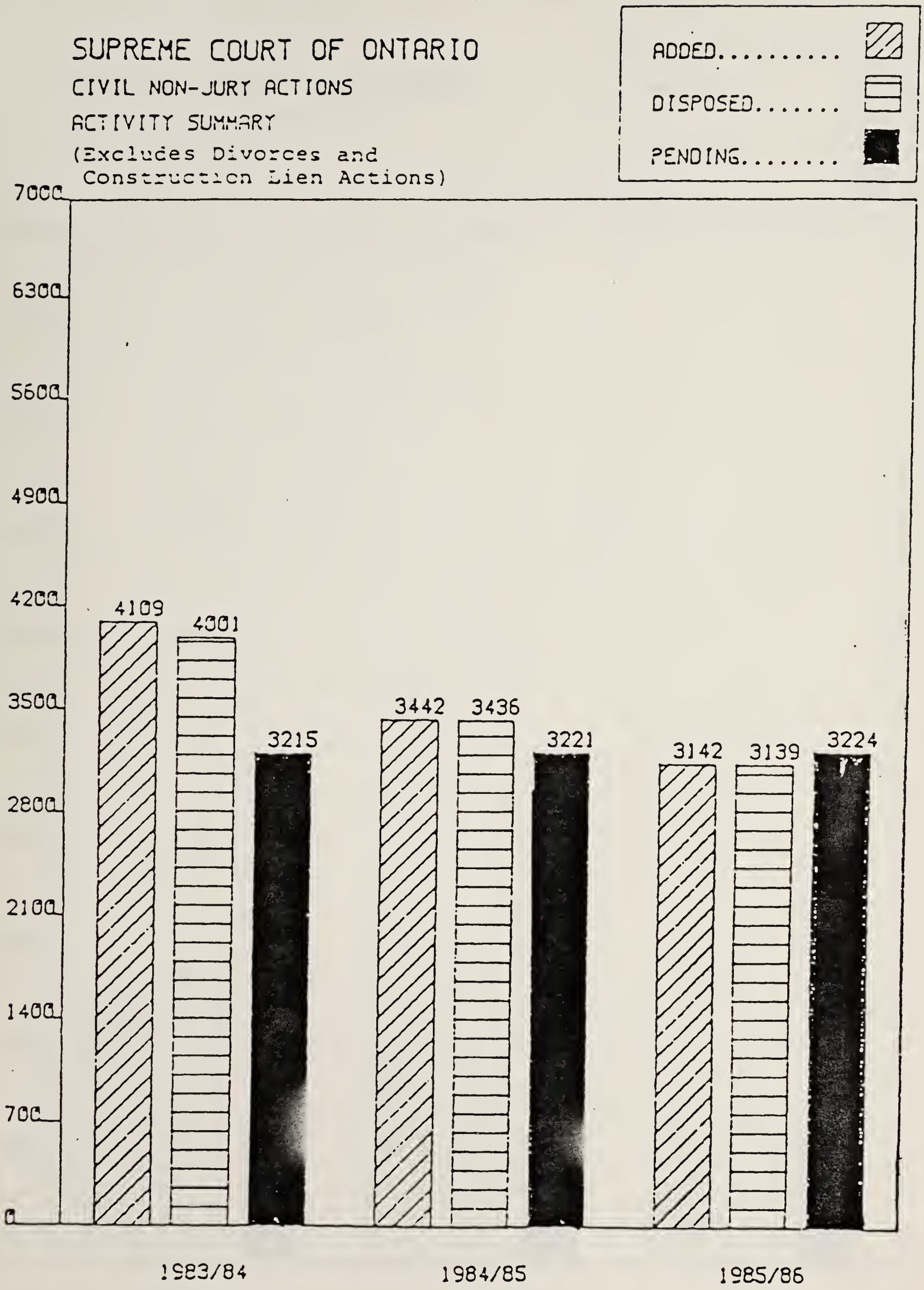


SUPREME COURT OF ONTARIO

CIVIL NON-JURY ACTIONS

ACTIVITY SUMMARY

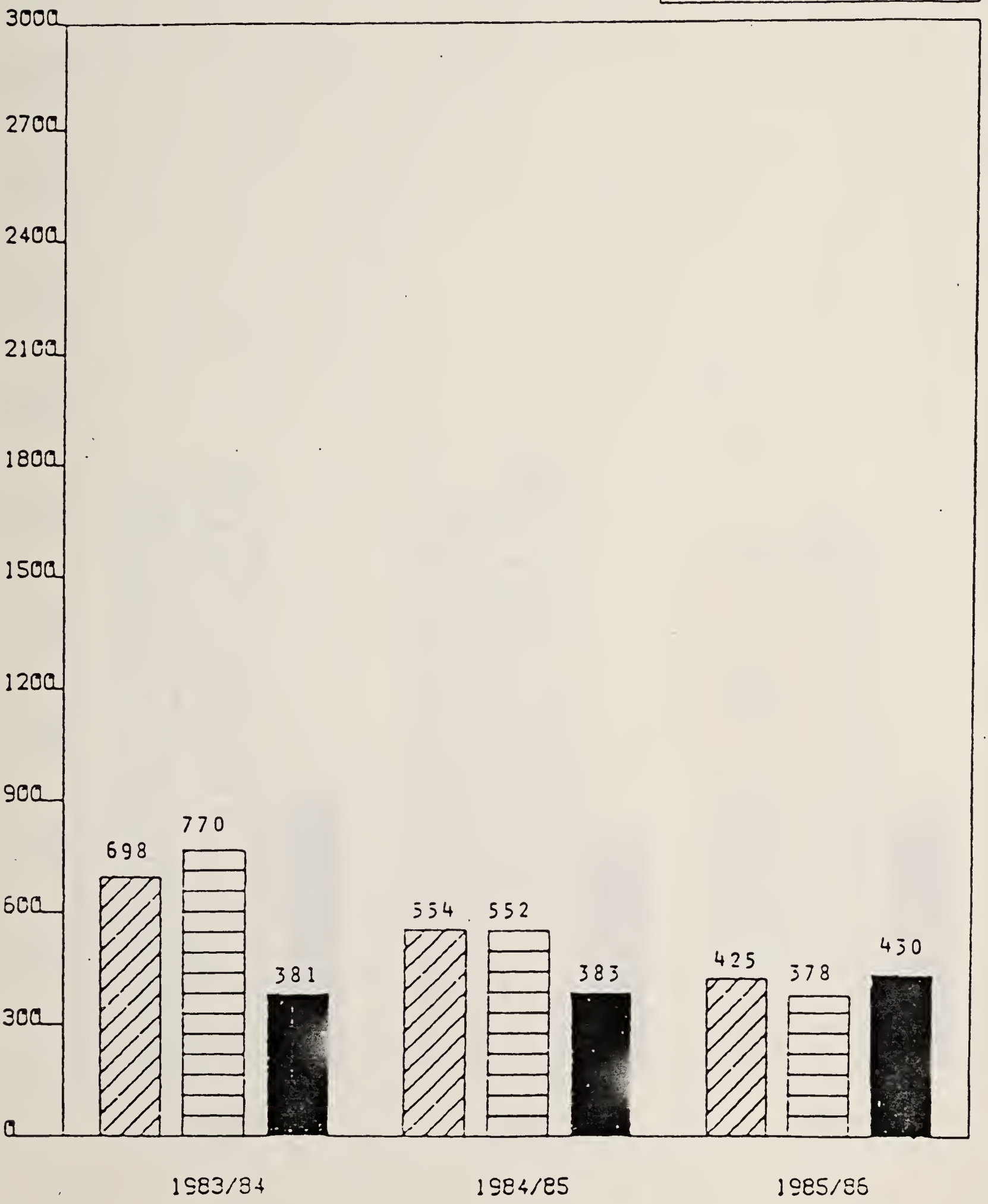
(Excludes Divorces and Construction Lien Actions)



SUPREME COURT OF ONTARIO

HIGH COURT DIVORCE ACTIONS

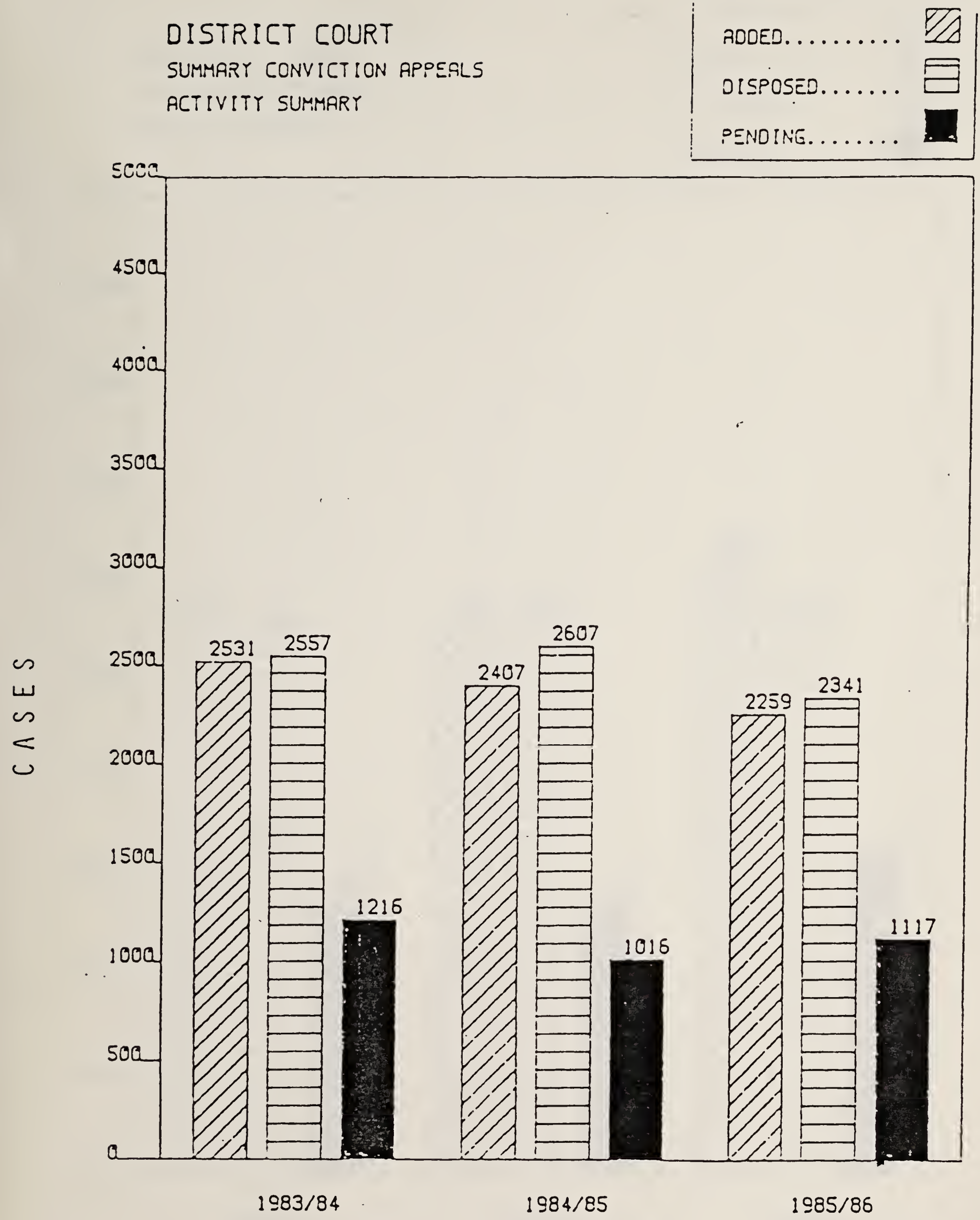
ACTIVITY SUMMARY



DISTRICT COURT

SUMMARY CONVICTION APPEALS

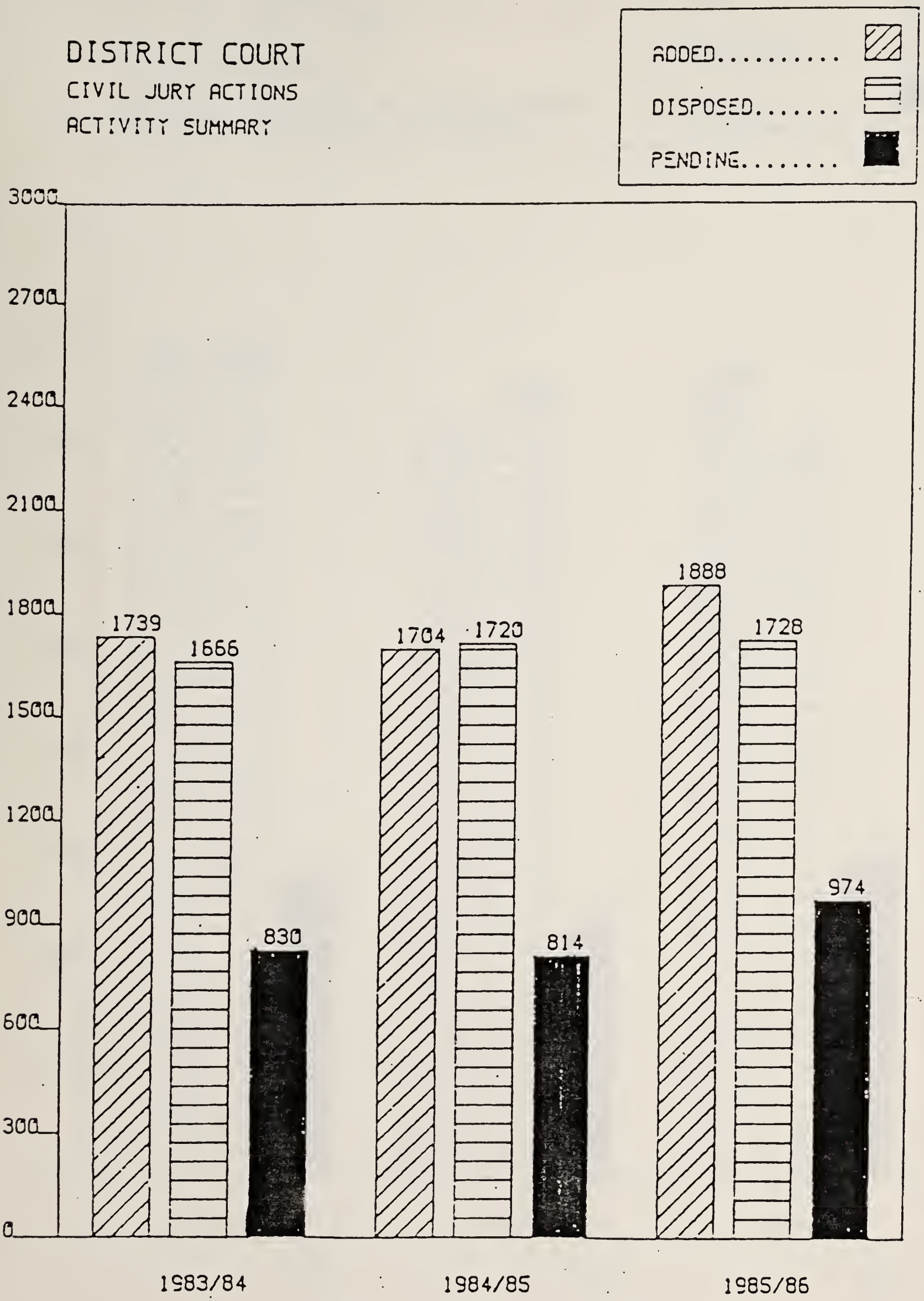
ACTIVITY SUMMARY



DISTRICT COURT

CIVIL JURY ACTIONS

ACTIVITY SUMMARY

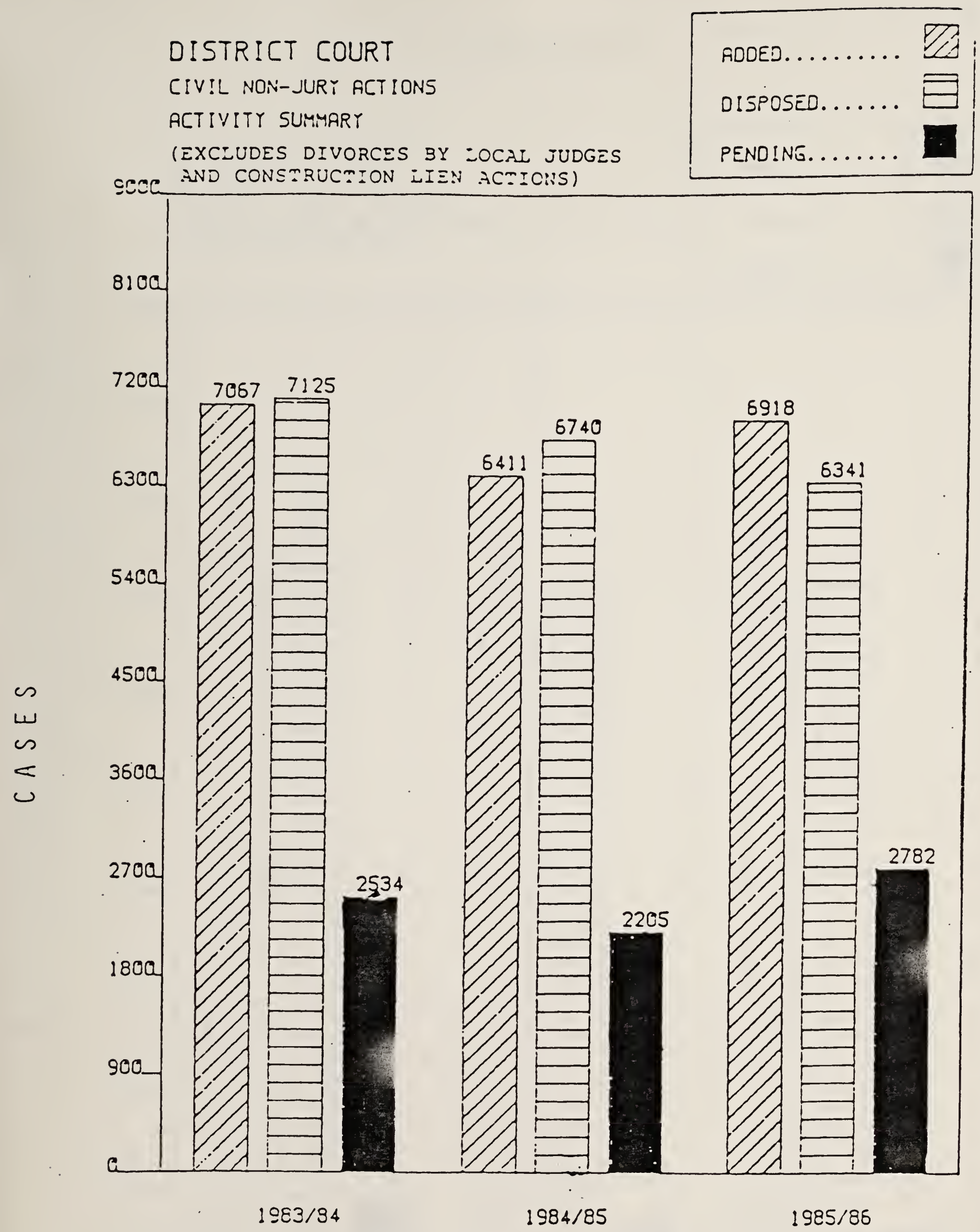


DISTRICT COURT

CIVIL NON-JURY ACTIONS

ACTIVITY SUMMARY

(EXCLUDES DIVORCES BY LOCAL JUDGES AND CONSTRUCTION LIEN ACTIONS)



DISTRICT COURT

DIVORCE CASES BEFORE
LOCAL JUDGE OF HIGH COURT
ACTIVITY SUMMARY

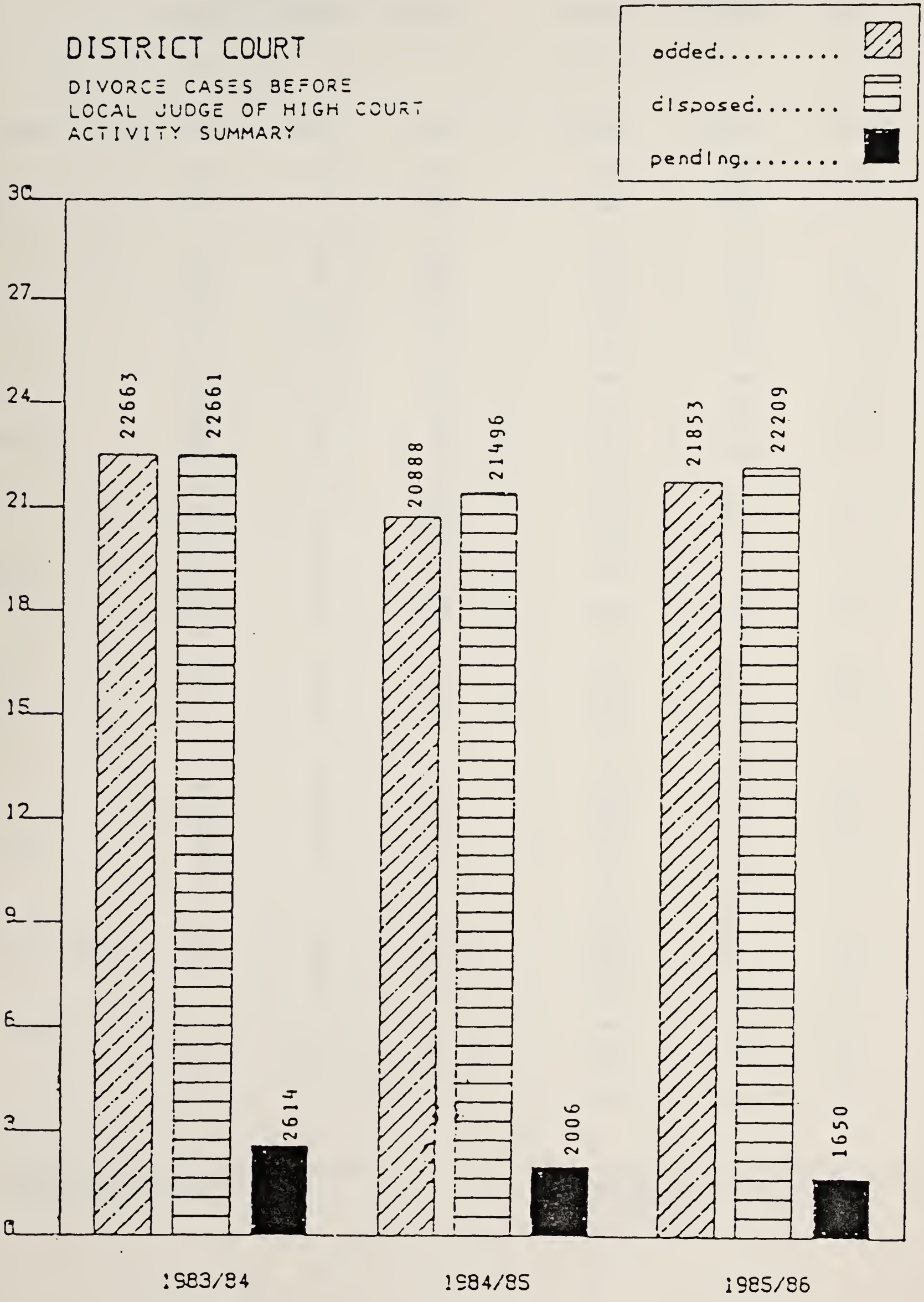


TABLE II.11
DISTRICT COURT
EXAMINATIONS FOR DISCOVERY

Judicial District County, or District	Appointments Made			Appointments Held		
	1983/84	1984/85	1985/86	1983/84	1984/85	1985/86
TOTAL ONTARIO	--	--	--	--	--	--
York	..	..	..	..	..	..
REMAINDER OF ONTARIO	19743	17794	14819	12062	10817	8620
Algoma	819	586	454	623	536	422
Brant	487	413	300	287	251	148
Bruce	137	191	170	90	126	94
Cochrane	7	63	92	12	45	57
Dufferin	244	184	155	143	146	111
Durham	1012	970	923	704	629	606
Elgin	273	270	181	162	128	100
Essex	134	142	90	62	62	42
Frontenac	581	393	236	218	206	140
Grey	206	179	127	83	92	74
Haldimand	117	115	68	69	60	55
Halton	994	980	982	588	531	465
Hamilton-Wentworth	80	..	..	..	..	..
Hastings	433	394	334	258	219	195
Huron	223	221	148	97	83	84
Kenora	223	170	81	132	106	57
Kent	409	245	323	238	131	167
Lambton	597	557	538	358	383	339
Lanark	64	62	54	48	42	37
Leeds & Grenville	333	283	217	164	132	110
Lennox & Addington	31	38	27	26	18	14
Manitoulin	19	13	18	13	8	13
Middlesex	1977	1705	1672	1392	1229	1134
Muskoka	120	91	71	69	44	41
Niagara North	..	..	..	..	..	..
Niagara South	762	580	503	393	315	264
Nipissing	267	174	137	204	116	109
Norfolk	202	196	136	122	121	69
Northumberland	143	124	115	100	89	66
Ottawa-Carleton	..	..	..	..	..	..
Oxford	249	201	207	151	109	123
Parry Sound	175	166	138	77	68	61
Peel	2016	2100	1736	1100	1224	835
Perth	181	160	121	100	79	74
Peterborough	422	424	354	307	330	279
Prescott & Russell	150	132	124	96	87	63
Prince Edward	29	29	26	28	27	22
Rainy River	60	36	48	44	32	44
Renfrew	194	178	137	116	109	92
Simcoe	912	806	347	435	321	88
Stormont, Dundas & Glengarry	315	261	231	177	150	151
Sudbury	658	658	531	520	505	416
Thunder Bay	767	630	501	374	323	237
Timiskaming	211	178	271	153	131	172
Victoria & Haliburton	142	156	158	87	89	83
Waterloo	1123	1085	593	921	796	351
Wellington	511	543	494	317	305	298
York Region	734	712	650	284	284	218

NOTES: (1) Excludes data for York, Hamilton-Wentworth, Niagra-North and Ottawa-Carlton.

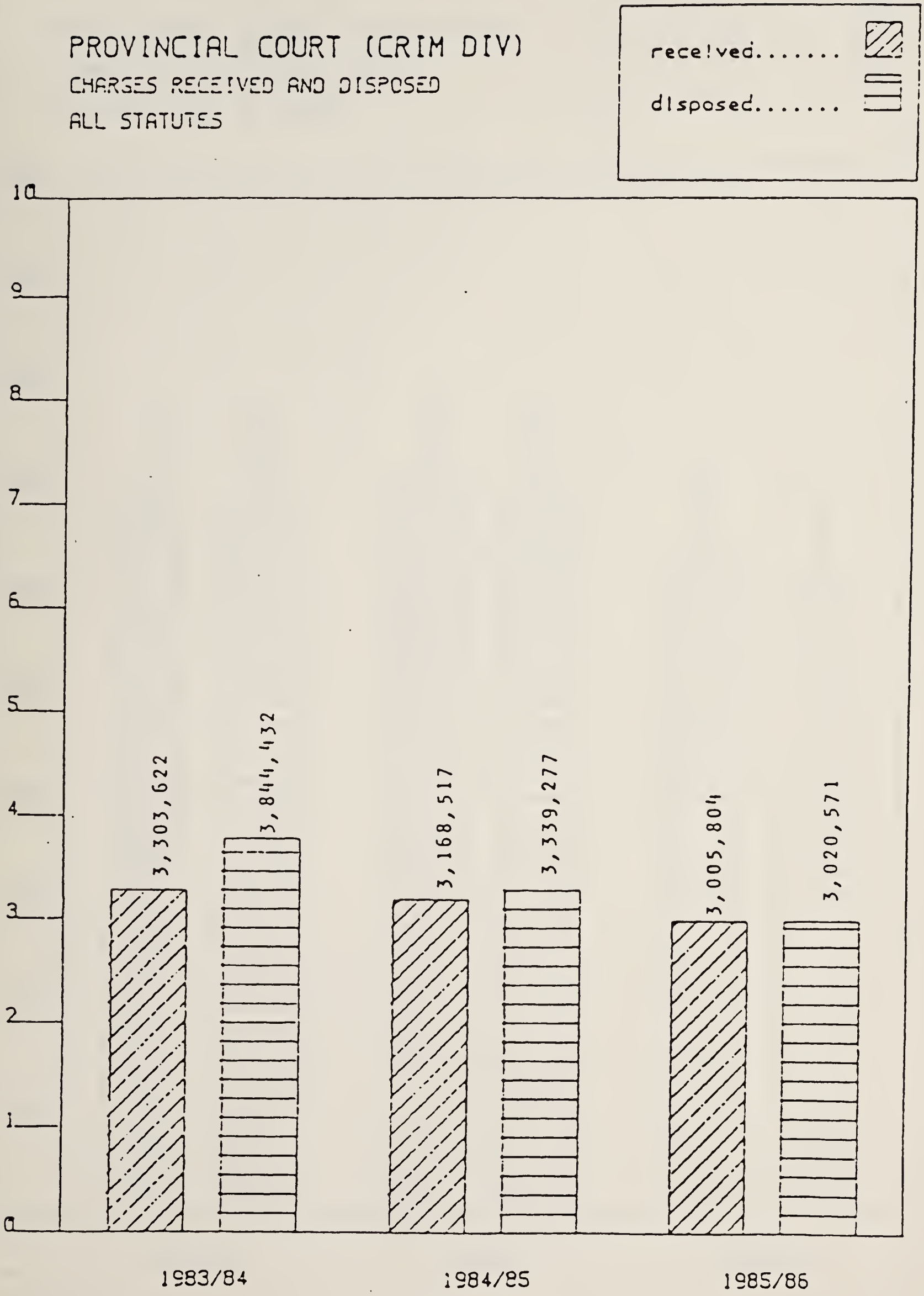
Source: Supreme, District and Surrogate Courts (Monthly Statistical Report) submitted through the Local Registrar's Office

2485A/205A/26

PROVINCIAL COURT (CRIM DIV)

CHARGES RECEIVED AND DISPOSED

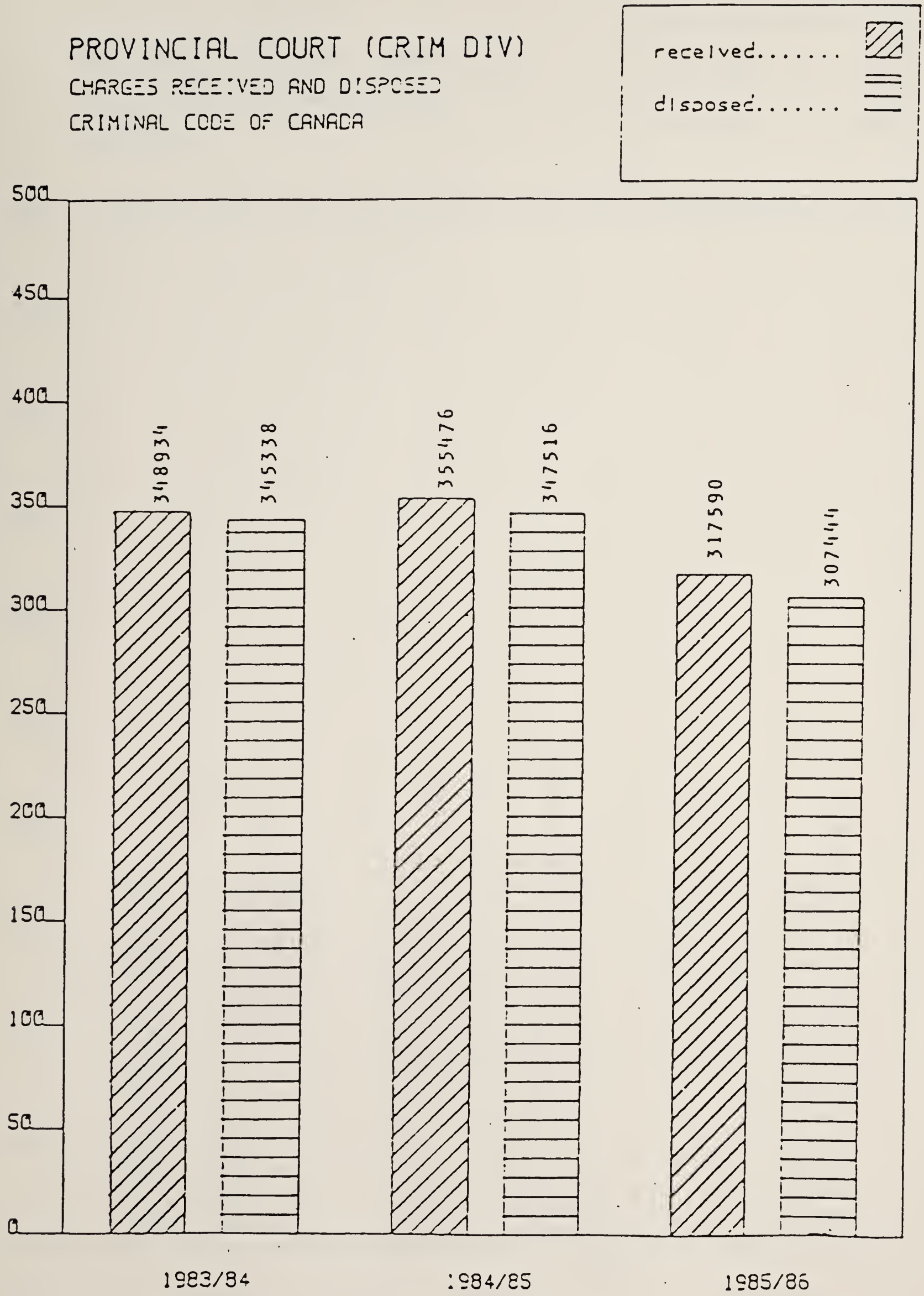
ALL STATUTES



PROVINCIAL COURT (CRIM DIV)

CHARGES RECEIVED AND DISPOSED

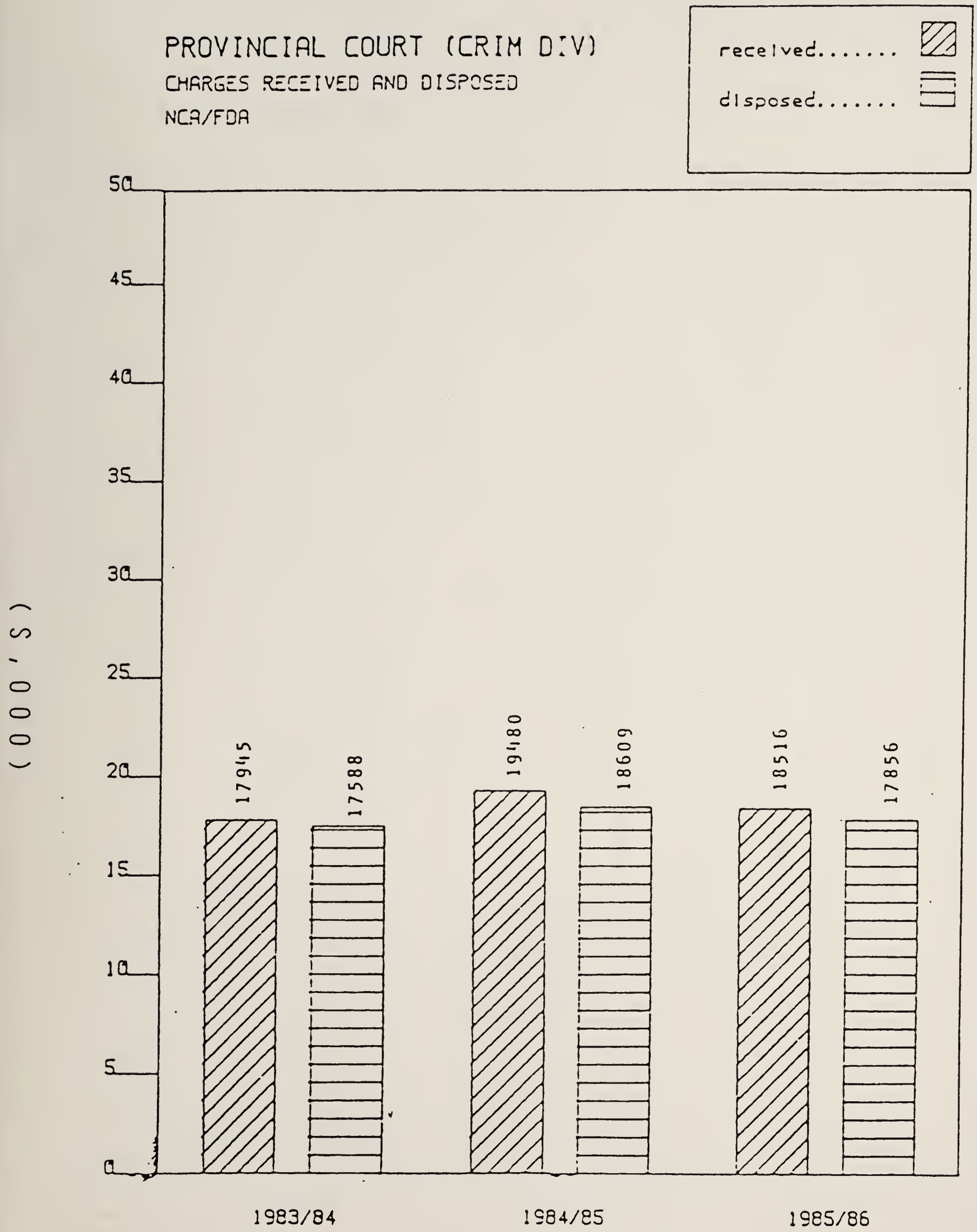
CRIMINAL CODE OF CANADA



PROVINCIAL COURT (CRIM DIV)

CHARGES RECEIVED AND DISPOSED

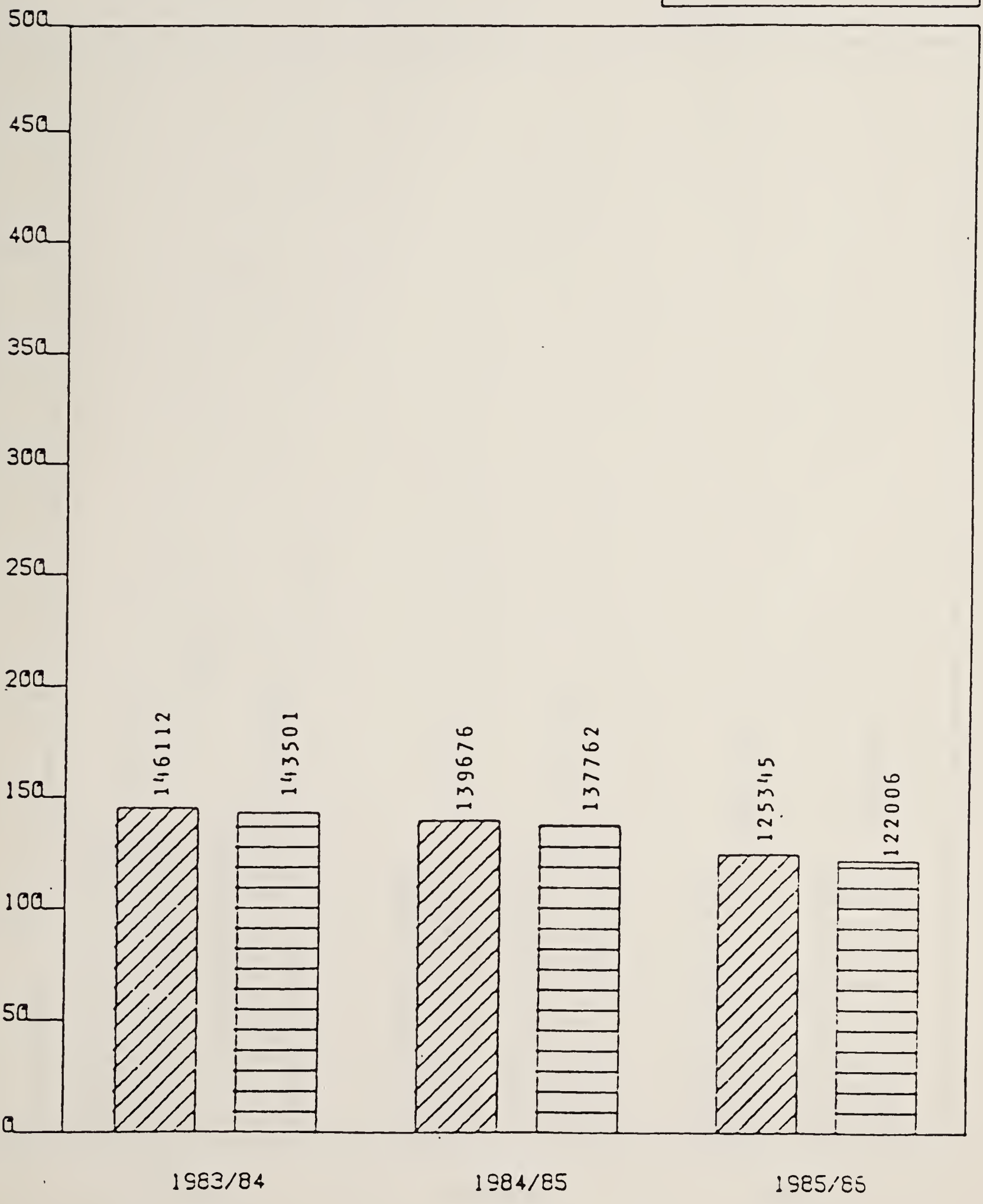
NCA/FDA



PROVINCIAL COURT (CRIM DIV)

CHARGES RECEIVED AND DISPOSED

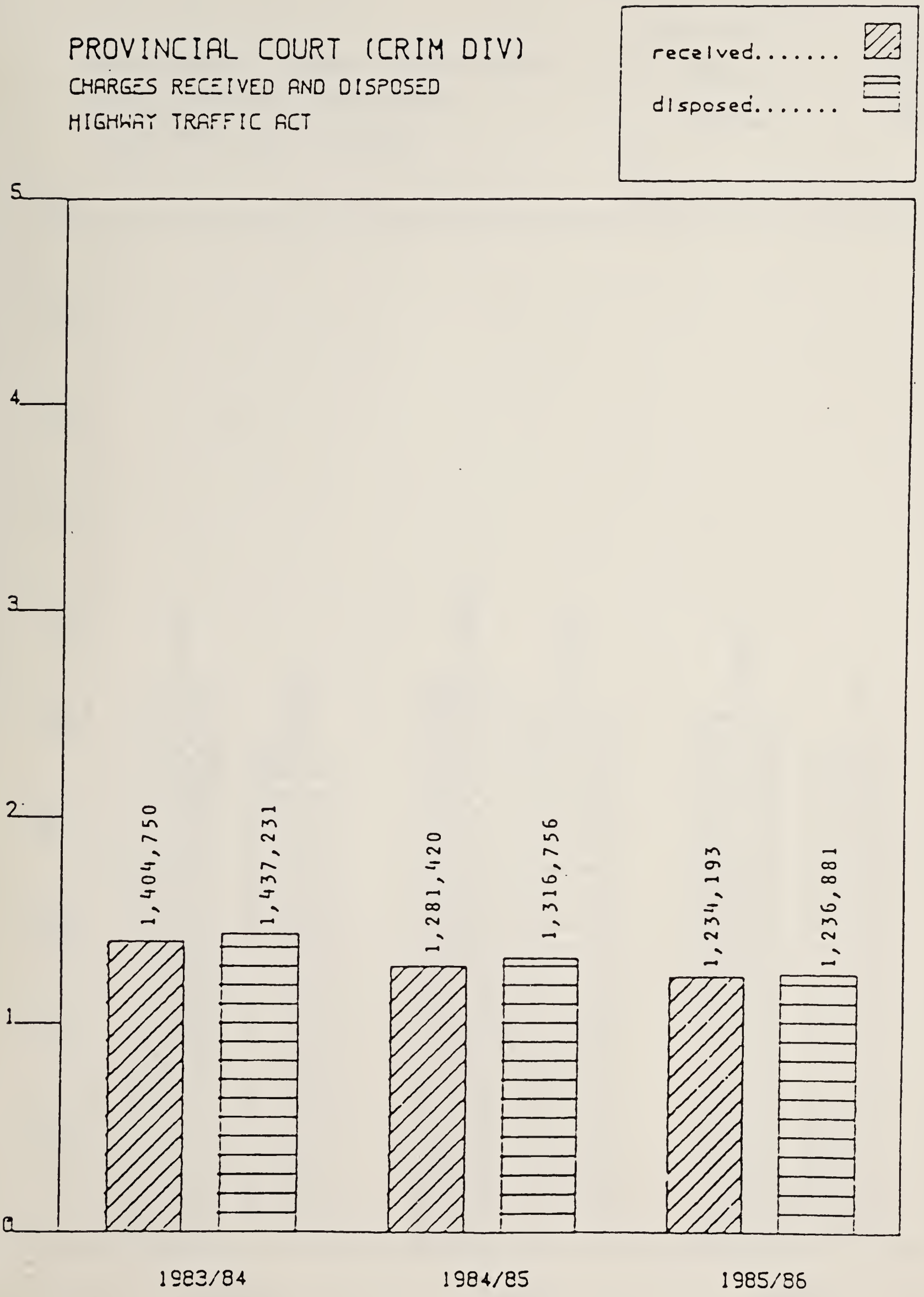
LIQUOR LICENCE ACT



PROVINCIAL COURT (CRIM DIV)

CHARGES RECEIVED AND DISPOSED

HIGHWAY TRAFFIC ACT



PROVINCIAL COURT (CRIM DIV)

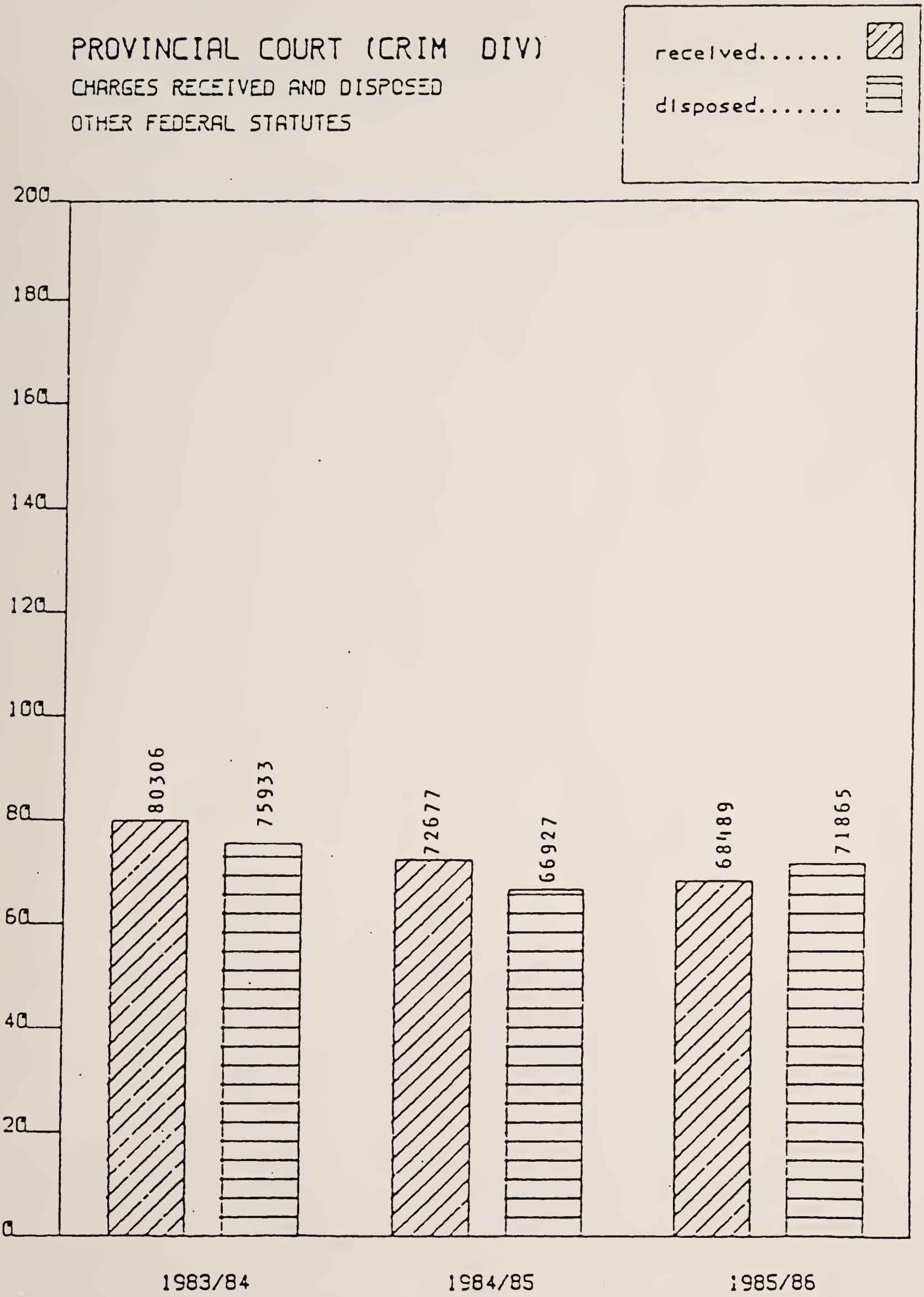
CHARGES RECEIVED AND DISPOSED

OTHER PROVINCIAL STATUTES

PROVINCIAL COURT (CRIM DIV)

CHARGES RECEIVED AND DISPOSED

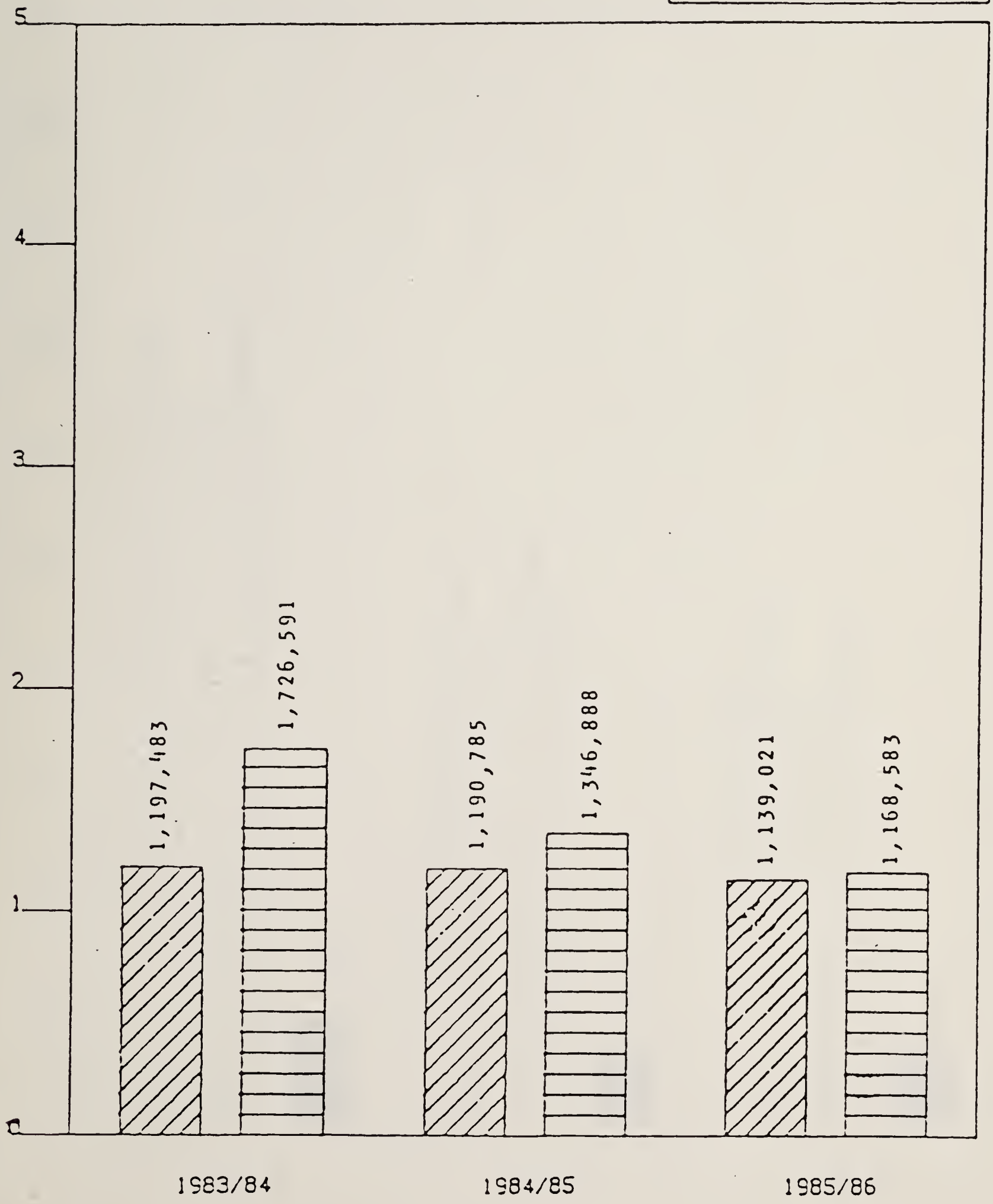
OTHER FEDERAL STATUTES



PROVINCIAL COURT (CRIM DIV)

CHARGES RECEIVED AND DISPOSED

MUNICIPAL BYLAWS



PROVINCIAL COURT (FAMILY DIV)

MATTERS RECEIVED AND DISPOSED

ALL STATUTES